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E. M. MEIJERS

The Benelux Convention on Private International Law

In 1948 the governments of the three Benelux States—Belgium, the Netherlands, and Luxemburg—established a permanent committee of experts to prepare drafts containing uniform rules on matters of private or penal law.

One of the first subjects to which consideration has been given is private international law. The draft of uniform rules concerning private international law, prepared by the committee, has been accepted by the Governments, and a Convention containing these uniform rules concluded by representatives of the three States on May 11, 1951.[1]

The Convention is not intended to give solutions for all questions of private international law. In twenty-eight articles it provides rules only for the most important problems. A short survey of the twenty-eight articles follows:

In matters of capacity and status, the three Benelux States have followed the principle of nationality for one hundred and fifty years. It was therefore evident that this was the appropriate solution for a uniform law. Notwithstanding this consideration, the merits and demerits of the system of nationality were discussed anew by the committee and, in accordance with the opinion of the majority of authors in the Benelux countries, the committee has determined that the principle of nationality must be maintained for its intrinsic merits as well as on traditional grounds.

E. M. Meijers, former professor of law at Leiden University, who was appointed in 1947 to revise the Civil Code of the Netherlands, is one of the authors of the Benelux Uniform law on Private International Law.

[1] The Convention has not yet entered into force, as it still is to be ratified by acts of parliament in the three States. The original Dutch and French texts of the Convention and the Uniform Law have been published in 1951 Tractatenblad van het Koninkrijk der Nederlanden, No. 125; French text of the Uniform Law in 40 Rev. Critique de D.I.P. (1951) 710 ff., and English translation in 1 International and Comparative Law Quarterly (4th Series 1952) 426 ff. For the Report of the Benelux Committee as published by the Netherlands Government, see Zitting 1951–1952—2329; French text in 40 Rev. Critique de D.I.P. (1951) 714 ff., 41 *id.* (1952) 165 ff., 377 ff.

As explained in the Report, the Uniform Law, when adopted, is to apply as domestic law not only within the Benelux group, but also in respect of other countries. References in the text to articles of the Convention are to the Uniform Law adopted by the Convention. *Ed.*

On one recent fact supporting the principle of nationality I should like to insist.

Today it is impossible to differentiate in private international law between the Eastern countries that have accepted the Western principles concerning marriage and the relations between parents and children, and those which follow quite different conceptions in their laws. The time for special codes or special jurisdictions for white people in such countries has passed. Must a Western State now accept bigamy, child marriages, and letters of repudiation as legal for its subjects, domiciled in such countries?

Countries accepting the principle of domicil have only two ways of escape: public policy or the introduction of a domicil of origin. But a domicil of origin (*Heimatsort*) is nothing but a substitute for nationality, borrowed from Roman law, which is useful in a State embracing many diverse legal systems. And the principle of public policy applied in such cases is no more than a mask for the principle of nationality, because it is invoked only for the purpose of submitting subjects to the national law of their own State, not to force foreign law on individuals owing allegiance to the State where they are domiciled.

Although the Convention has accepted the principle of nationality for subjects abroad, it has not been blind to the fact that a great number of States follow the principle of domicil. A rigid application of the principle of nationality so as to include the subjects of such States would increase the number of instances in which the same case would be judged differently according to the country where it was tried. To avoid this result, the Benelux Convention has disavowed the method adopted by the French commission for the revision of the French code, which subjects everyone who has been resident in France for more than five years to French law, while holding French law still applicable to French subjects irrespective of how long they have been domiciled abroad.

In the Benelux Convention, it has been accepted as a general principle not to lay down rules that, if accepted by other States, would lead to different decisions in those States.

Nor has the theory of renvoi been accepted as the solution; this is rejected as a general rule in article 1, paragraph 1, of the Convention. Instead, the Convention provides a secondary rule prescribing application of the law of the domicil in questions concerning status and marriage in three defined cases (article 15):

1. When the propositus is stateless or his nationality or his national law cannot be established with certainty;
2. When a foreigner has his domicil in the Netherlands[2] and the rules

[2] For Belgium read: in Belgium; for Luxemburg: in Luxemburg.

of international private law of his own country declare the law of his domicil applicable;

3. When a foreigner has his domicil outside the Netherlands[2] and both his national law and the law of his domicil declare the latter law applicable.

The cases *sub* 2 and 3 seem to be applications of the theory of renvoi, but in reality they are not. In these cases the Dutch judge applies the law of domicil, not because a foreign law so decrees but because a secondary rule of his own law prescribes the law of domicil as applicable in such cases. The practical consequences are: First, the law of domicil is determined according to the Dutch conception of domicil and not according to that of the national State of the propositus which also prescribes application of the law of domicil. Second, the judge of a foreign State that applies the law of domicil combined with the theory of renvoi will have no difficulty with persons domiciled in the Netherlands.[2] There can be no question of further renvoi, because the Benelux Convention contains rules excluding the possibility of a further renvoi.

A second exception to the principle of nationality has been made in article 5 with regard to the effect of marriage upon the property of husband and wife. Here the law of the first matrimonial home is preferred, but only in case the husband has never had a domicil in his own country or more than five years have passed since he has left his country without intention to return. The law of the first matrimonial home is not applied as respects effects forbidden by the national law of the husband. This reserve has little value for Dutch subjects, because the Dutch law allows practically every form of separate, common, or joint property between husband and wife.

Finally, the principle of nationality is further mitigated in the case of a person who is incompetent by his national law, but competent according to the *lex loci actus*. In that case, article 2, paragraph 2, protects the good faith of those who have considered him as competent.

Article 3 concerns juristic persons. The Convention does not follow the Anglo-American system that the law under which a juristic person is incorporated governs its personality and the powers of representation of its organs. These matters are regulated by the law of the place where its control and management is located. This solution is already common to the three countries. The law of incorporation cannot be followed for the simple reason that many juristic persons are born without any act of incorporation. In Belgium, when a group of individuals form themselves into an association with a written constitution and the aim of the association is not to make profits, the association acquires personality without

any governmental act. In the Netherlands, the same rule exists for collective societies. Likewise, in the Netherlands, a will or written attestation by which funds are destined for the benefit of some external purpose creates a juristic person without the necessity of any act of incorporation.

Article 3, paragraph 2, adds that the capacity of a foreign juristic person in a Benelux State cannot be greater than that of a similar one resident in such State.

In matters of marriage, difficulties arise in States accepting the principle of nationality when husband and wife have different nationalities even after the solemnization of the marriage. A similar difficulty occurs still more frequently in countries applying the principle of domicil when husband and wife have different domicils. For these questions, the Convention declares that in general the law of the husband is decisive (articles 4 and 5). However there are exceptions:

When the law of the husband creates a total or partial incapacity for a wife, this incapacity is only accepted insofar as it is in accordance with the law of the wife (article 4). On the other hand, where only the law of the wife declares her to be without capacity, her capacity will be established conformably to the law of her husband.

Divorce and separation produce similar questions. On these, the law of the suing party is decisive (article 6, paragraph 1).

The following rules are also important as respects divorce and separation:

In the Netherlands,[3] no divorce or separation can be pronounced, unless there is good cause for divorce or separation in accordance with Dutch law (article 6, paragraph 2). Therefore, both the personal law of the plaintiff and the Dutch law must admit divorce or separation, although it may be on different grounds. But when the personal law of the plaintiff admits only divorce and not a *separatio thori*, separation may nevertheless be sought according to Dutch law (article 7).

With regard to a divorce or separation pronounced abroad, the most important rule is found in article 25, paragraph 2. This provides that the formation or dissolution of a legal relation in a foreign country according to the rules of private international law of the States properly concerned, must be recognized in the Benelux countries, even when such formation or dissolution has occurred in contradiction to the Benelux rules of private international law.[4]

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[3] See the preceding note.

[4] This rule is different from the rule expressed in the Convention in article 25, paragraph 1, prescribing recognition of vested rights. The latter rule applies when, in accordance with the

The relations between parents and their legitimate children are governed by the national law of the father (article 9, paragraph 1). The status of children has not been considered as something concerning the children exclusively, but as a relation existing between them and their parents. In this relation consideration must be given to the parents in preference to the children for the practical reason that the nationality and domicil of the children depend often upon the status, legitimate or illegitimate, that must be attributed to them. In the relation between parents and children, only the nationality and the domicil of the parents at the moment of the birth of the child form a fixed point. Therefore, the Convention starts in article 9 from that point, and the law of the father is chosen as the law governing the relations between the parents and their legitimate children, just as between husband and wife the law of the husband is decisive.

The Convention has no special rule concerning legitimation and adoption, but it follows from the principles accepted by the Convention that legitimation must be governed by the law of the nationality of the husband at the moment of the legitimation.

Adoption is an alteration of the status of a child by a bilateral act. Therefore, adoption must take place in accordance with the personal laws both of the adopter and of the adopted child. Again, the relations formed by the adoption should be governed by the personal law of the adopter.

The rules concerning the relations between illegitimate children and their father and mother are similar to those given for legitimate children. Only because there are no legal bonds between the father and the mother, the Convention has separate rules for the relations between the father and the illegitimate child and those between the mother and her child. Under these rules, the national law of the father or of the mother, respectively, governs these relations. The Convention gives no solution for the case where the parents are of different nationality and the rights recognized by the personal law of one of the parents are inconsistent with the rights given to the other parent by his personal law. Here it is difficult to prescribe a general rule, but in most cases the personal law of the father must prevail.

The obligation of maintenance between parents and children is considered in the Convention as forming part of their legal relations and is consequently governed by the personal law of the father or the mother.

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rules of private international law of the forum, a right has been acquired, but the facts have since been altered, and consequently another law has become applicable.

In the case of article 25, paragraph 2, the acquisition of the right has never been in accordance with the rules of private international law recognized by the *lex fori*.

However, the personal law of an illegitimate child must be taken into consideration for his maintenance, when this law gives him more advantage than the personal law of his parent (article 9, paragraph 2).

As a rule of public policy, the Convention provides that no judge of a Benelux State may make inquiries about descent or sexual intercourse in cases where his own domestic law forbids such inquiries (article 9, paragraph 3). For instance, the law of the Benelux States does not permit bastardy to be proved when the father has not disavowed a child born in wedlock within a short period after he had been informed of its birth. This rule must be applied by a Benelux judge even when the personal law of the father and the child allows proof of bastardy in that case.

Articles 10 and 11 of the Convention concern guardianship of infants and measures for the protection of adults affecting capacity. These articles correspond with the rules laid down in the Hague Convention of 1902 and 1905 on guardianship and interdiction. Guardianship and interdiction are governed in the first place by the personal—that is the national—law of the incapable person. When no guardianship or interdiction has been organized in accordance with the national law, measures conforming to the law of the residence or even of the *lex rei sitae* must be recognized as valid.

The Convention has intentionally not provided for questions of classification, although these rise frequently in cases of status and capacity. For instance, when a German woman domiciled in Germany has borne an illegitimate child by a Dutchman domiciled in the Netherlands, who has recognized the child and has demanded guardianship in accordance with Dutch law, a Dutch judge will decide that this child has Dutch nationality, a Dutch domicil, and a Dutch guardian. On the contrary, a German judge must consider the child as German, and will give it a German guardian and in consequence a German domicil. So long as no convention governs the conceptions of nationality and domicil in a uniform way, rules of private international law, based on these concepts, will be applied differently in the various countries.

One of the most delicate but also most important subjects in private international law is the law of succession. The three Benelux States still have different rules concerning this matter. In Belgium and Luxemburg, the judicial decisions have accepted the old medieval system, which is still in force in France and the Anglo-Saxon countries, namely, that the succession of immovables is governed by the *lex rei sitae* and of movables by the law of the last domicil of the *de cuius*. In the Netherlands, the precedents and the textbook writers prefer to subject the entire property of a *de cuius*

to one law, the national law of the *de cuius* being chosen for this purpose by the greater number of such authorities. In Belgium, various writers have upheld the same opinion, which also has been accepted in the Benelux Convention.

Article 13 provides that the national law of the *de cuius* determines the persons capable of succession, the order of succession, the respective shares, the legal portion (*portio legitima*), and the hotchpot rule. The same law must be applied in deciding questions of the essential validity and the legal effects of wills.

If a person is entitled to the whole or part of a succession by the national law of the *de cuius*, but is excluded by the *lex rei sitae*, the title acquired by another person under the latter law is valid, but he must compensate the person entitled to the same assets by the national law of the *de cuius*. Among persons to whom the succession must be distributed, such compensation can be effected by debiting the sum owed against the share of the debtor (article 14).

Of great importance is the effect attributed to the law of the last domicil of the *de cuius*.

In the first place, administration of the estate, imputation of debts, repudiation and acceptance of the succession must be performed according to the law of the last domicil of the *de cuius* (article 13, paragraph 4).

In the second place, the national law of the *de cuius* will be replaced by the law of the domicil in the same cases as mentioned above relative to status and capacity. The consequence will be that when a foreigner, who is a subject of a State that in matters of succession applies the law of the domicil of the *de cuius*, dies domiciled in one of the Benelux countries, the domiciliary law and not the national law will govern the succession of such foreigner according to the Convention (article 15, No. 2).

Article 16 gives a general rule for interests in movables and immovables. These are governed by the *lex situs*, as well as the question which assets must be considered as movables and which as immovables.

For movables in transit, the governing law is that of the country where delivery to the buyer is to take place. This rule conforms to article 4 of the Oxford Rules of 1932 of the International Law Association, while the draft proposed at the Hague Conference of October 1951 accepted the opposite system, viz. that the law of the country in which the goods were shipped should be decisive.

The Benelux Convention makes no distinction, as is made in the draft of the Hague Conference, between parties to a transfer of property and

other persons; the *lex situs* governs all questions of property. But the discussion of this question at the Hague Conference is not yet terminated.

For the law which must govern the essential validity and the effects of contracts, the Benelux Convention has chosen neither the system of autonomy nor that of the proper law of the contract as the only possible solution.

In article 17, the Convention makes a double distinction: (a) between contracts that in fact are closely connected with a country and contracts without such close connection; (b) between peremptory and optional rules of the law of a country.

I. When a contract, although possessing some international elements, is closely connected with only one country, the law selected by the parties can replace only the optional rules of the law of that country; the corresponding selection of a law can be express or implied.

When a contract is closely connected with a country and the parties have neither expressly nor impliedly chosen an applicable law, this proper law of the contract governs all questions of validity and effects of the contract.

II. When a contract with an international character is not closely connected with one country, the parties can freely choose the governing law; both the optional and the peremptory rules of this law will be applicable.

When the parties have neither expressly nor impliedly chosen the governing law, the law of the country where the contract has been concluded will be applicable. When the contract has been concluded *inter absentes*, the law of the country from which the offer has been made governs the contract.

Thus, it will be observed that the Convention recognizes two types of international contracts: contracts which are closely connected with one country and real international contracts which have relations with different countries but with none so close that the contract must be regarded as within the legal sphere of any one country. The greater part of international contracts of sale are in this second group. Consequently, for international sales of movables, the Benelux Convention recognizes, in conformity with the Hague Conference of 1951, the absolute autonomy of the parties to choose the applicable law. The Convention differs from the Hague draft in that the latter declares the law of the seller applicable in default of a choice, while the Benelux Convention applies the law of the place from which the offer has been sent. This difference is more theoretical than practical, because in practice it is always the seller who makes the offer.

Obligations originating from a tort are governed by the *lex loci delicti* (article 18, paragraph 1). However, when the effects of a tort pertain to the sphere of a different country than that in which the tort was committed, the legal consequences of the tort are determined by the law of the former country (article 18, paragraph 2). As an example of such an intrusion into the sphere of another country, the report of the standing Benelux committee has mentioned the case of a collision near the frontier between two motorcars operated and owned by persons both living in the neighboring country. Such accidents are very common near the Belgian-Luxemburg frontier. The legal consequences of such an accident are always settled according to the law of the domicil of the parties.

The law that governs an obligation also determines the manner of its performance, the legal effects of nonperformance, and the different forms of discharge (article 19, paragraph 1).

The *lex loci solutionis* has been assigned a circumscribed small sphere of application. First, when the *lex loci solutionis* contains peremptory rules for the manner of performance, these rules must be observed even if the obligation is governed by another law (article 19, paragraph 3). Thus, payment in gold cannot be demanded if a system of inconvertible paper money has been adopted in the country where performance is due. From the optional rules of the country where performance is due, only those will be applied which concern the time and manner of inspection when movables are delivered and the measures to be taken when movables are refused (article 19, paragraph 2). This section was inspired by the draft prepared by the de la Morandière Committee for the Hague Conference of 1931.

The law of the country where execution occurs determines the order in which debts entitled to priority will be paid (article 20). This rule is not intended to affect the rights of mortgagees; these have a vested right that may not be lost by transport of the movable followed by execution.

Article 21 provides for the assignment of debts. The Convention does not consider a debt as a chose in action with a situs. Assignment of debts is governed by the same law that governs the substance of the obligation (article 21, paragraph 1). The possibility of assignment and its conditions are part of the effects attached by law to a contract or a tort. Even before the Convention, this was the common opinion in the Benelux States. However, when an assignment is made without co-operation of the debtor, the rules prescribed by the law of his domicil in his interest or in that of a third party, must be observed (article 21, paragraph 2).

Article 22 of the Convention determines the effects of an authority with which an agent has been clothed for acting abroad. The law of the

country where the agent acts with a third party determines whether the act is within the authority of the agent. And the same law determines whether an undisclosed principal can sue a third party or be sued by him (article 22). This is the rule now generally accepted in the Anglo-Saxon countries but still contested in France and even in Belgium. There the opinion that the basis of an authority is a contract between agent and principal (*contrat de mandat*) and that the effects of the authority depend on that contract, is dominant. However, the rule given in article 22 concerns the relations between the third party and the principal, not those between the agent and the principal. A third party may rely on the ostensible authority of an agent. What may be considered as ostensible depends on the common opinion existing in the place where the agent has acted.

Article 23 concerns the formal validity of acts. Continuing an old tradition, the Convention has accepted a liberal conception of the rule: *locus regit actum*. The article provides that an act is formally valid in every case in which the form prescribed by the law of the country where the act has been performed is observed. Which law may also apply instead of the *lex loci actus* is not mentioned in the article, but the *lex causae* is likely to be taken into consideration in the first place. A special provision, such as that in the English Foreign Marriage Act determining that a marriage solemnized in a foreign country in compliance with the English forms shall be as valid as if it had been solemnized in the United Kingdom, is not necessary at present in the Benelux countries, nor will it be when the Convention has entered into force.

The Convention admits only one exception to the rule *locus regit actum*: this is in the case where the nature of the act or the national law of the party acting forbids the form even when the law of the country where the act is performed permits it. The nature of the act is opposed to the rule *locus regit actum*, when for instance title to immovables is transferred and the act must be performed according to certain forms in the country where the immovable is situated. The national law forbids the forms of the *locus actus*, as for instance the Dutch law does, where it recognizes the will of a Dutchman made abroad as valid only when made with the intervention of a notary. According to the Convention, such rules must also be respected in the three Benelux States, unless they should be deemed contrary to public policy. In the Benelux States, it must be considered as a rule of public policy that any one can marry before a civil officer; a foreigner can contract a marriage in that form, even when his national law admits only a special clerical form.

The Convention does not cover procedure in general. A Convention of 1925 between Belgium and the Netherlands already regulates the jurisdiction of Belgian and Dutch judges and the reciprocal execution of judgments and other acts. The only point of procedure ruled by the Convention is the subject of evidence.

Article 24 provides that, in general, evidence is governed by the *lex fori*. There are however several exceptions for matters where a rule of evidence is closely connected with the substantive law. The Convention indicates as such matters: burden of proof, the admissibility and the force of legal presumptions, and the special binding probative effect ascribed by the law of the *locus actus* to documents. Written or oral evidence is admissible according to the *lex fori*, the *lex actus*, or the *lex causae*.

A general clause (article 26) makes a reservation for nonapplication of a rule of foreign law when its application is against public policy. That is possible either when the rule itself is contrary to public policy or when a law of the court cannot be allowed to lapse in favor of a foreign law.

THOMAS L. BLAKEMORE AND MAKOTO YAZAWA

Japanese Commercial Code Revisions

Concerning Corporations

ONE OF THE MORE CURIOUS FRUITS of the Allied Occupation of Japan is a considerably revised Commercial Code.[1] That the mission of any non-communist military occupation, even one pledged to eliminate the economic basis for aggression, should include major changes in the normal business law of the occupied country is in itself a surprising fact. Even more remarkable is the Code which such a policy has evolved in Japan. On a Commercial Code of continental origin, there have been forcibly grafted certain limbs of alien, Anglo-American origin. From the viewpoint of legal esthetics, the product is far from pleasing, and in practice it has produced confusion. The first year and a half of its application has been a period of difficulty to Japanese lawyers and their corporate clients, and of bewilderment to Japanese legal scholars. There is, nevertheless, a good chance that many items of the present Code will not be repealed, even now that Japanese legislators have regained an opportunity to take independent action.

The story of the conception, enactment, content, and acceptance of the recent revisions of the Japanese Commercial Code is not inspiring nor entirely a credit to American legal leadership. Nevertheless it should interest the legal scholars of other countries for, like the medical data obtained from German concentration camp experimentation during World War II, the present revision probably will remain unique. This account also possibly might prove instructive to military governors, if in the future there again are those who regard a reformation of all areas of law as their duty.

I. BACKGROUND

The Commercial Code which the Allied Occupation authorities found when they took over Japan in September 1945 was an easily identified

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THOMAS L. BLAKEMORE is an American who was associated with the Institute of Current World Affairs in the study of Japanese law before World War II and served with the Allied Occupation Forces in Japan in a legal capacity from 1946 to 1949. He is now engaged in private practice in Tokyo.

MAKOTO YAZAWA is an Assistant Professor of Tokyo University and was a member of the committee for the preparation of revisions of the Commercial Code, as well as secretary of the Legislative Counsel of the Attorney General's Office assembled for that purpose.

[1] Law No. 167 of 1950. For an English translation of the text of the Code as revised, see "The Commercial Code of Japan," issued by Attorney General's Office in 1951.

member of the continental family. It has been transplanted to Japan from Germany approximately fifty years before, as one part of the unprecedented reception of Western law in the Meiji period, and had replaced almost all elements of feudal Japan's indigenous law merchant. The principal author was Herman Rossler, a German legal adviser to the Department of Justice, whose draft of 1884, after being roundly criticized as a foreign innovation, was partially accepted but was soon replaced by a new Code in 1899. The revised Code was politically acceptable in having been drafted by Japanese scholars, but nevertheless, in form and substance closely resembled the (then) draft German Commercial Code which took effect later at the onset of the twentieth century. Subsequent amendments to the Code in 1911, 1933, and 1938 in the field of corporate law also tended to reflect German developments.[2] Almost alone among the major Japanese codes, the Commercial Code was not regarded by Japanese scholars as one ripe for reform when the Allied Occupation commenced in 1945.

II. Occupation Policies

During the first years of occupation, the General Headquarters for the Supreme Commander for Allied Powers (generally and hereafter termed SCAP) paid slight attention to conventional commercial law. Its attention was on bigger game. Following the program officially described as the "Promotion of Democratic Force Manifested in the Basic Post Surrender Policy for Japan,"[3] SCAP revamped the economic framework of Japan, first by the dissolution of the huge combines peculiar to Japan called the Zaibatsu,[4] then by the imposition of legislation designed to

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[2] See Historical Introduction to "The Commercial Code of Japan" by Code Translation Committee of the League of Nations Association of Japan (1931) 30 *et seq.*; T. Ishii, "Commercial Law," Japan Science Review 50 *et seq.* (1950): also Nihon Shohoten no Hensan to sono Kaisei (Codification of Japanese Commercial Code and its Amendments) by O. Shida, 1933.

[3] A statement of policy by the Far Eastern Commission of July 11, 1947, at page 27, Nippon Kanri Horei Kenkyu, vol. 27, provided:

"Policies shall be laid down with the object of insuring a wide and just distribution of income and of the ownership of the means of production and trade. Encouragement shall be given to those forms of economic activity, organization and leadership deemed likely to strengthen the democratic forces in Japan and to prevent economic activity from being used in support of military ends. To this end it shall be the policy of the Supreme Commander ... to require a program for the dissolution of the large industrial and banking combinations accompanied by their progressive replacement by organizations which would widen the basis of control and ownership."

This policy was enunciated first in the United States Initial Post Surrender Policy for Japan in 1945 in similar language.

[4] Some European scholars see parallels to the Zaibatsu in European cartels, especially the German. The Zaibatsu were dissolved in compliance with the SCAP "Memorandum Concerning Dissolution of Holding Companies," of 6th November, 1945. The acts of dissolution were Imperial Ordinances No. 65 of 1945 and No. 23 of 1946.

further decentralize economic power,[5] and finally by the enactment of a most advanced variety of antitrust legislation.[6] Only in connection with the implementation of the last program and late in the course of the occupation did the Commercial Code finally come under the scrutiny of the Anti-Trust and Cartels Division of the Economic and Scientific Section of SCAP which then was exorcising monopoly in every field of law to which it had access.[7]

The initial step in SCAP's reform of corporate law was the abolition in 1948 of those provisions of the Commercial Code which permitted the issuance of shares in return for only a part of the face value and left the time of collection of the remainder subject to the decision of directors.[8] Later that year, the Japanese Attorney General's Office was instructed by the Economic and Scientific Section of SCAP to assemble a group of Japanese officials and scholars to join with representatives of the Occupation as a committee for the preparation of revisions of the Commercial Code for the stated purpose of "strengthening the status of shareholders." This committee commenced operations in 1949 and, after more than fifty sessions which lasted until the middle of the following year, formulated the revisions to the Commercial Code which, with but slight modifications, came into effect in 1951.

Since the necessity for strengthening the status of shareholders was not apparent to or acknowledged by the Japanese government or the Japanese members of the committee, and since the Occupation officials in charge were vehemently determined that changes should be made, the committee procedures were of a character unknown to Roberts Rules of Order. Nor-

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[5] The Elimination of Excessive Concentration of Economic Power Law (Kado Keizai Ryoku Shuchu Haijo Ho, Law No. 207 of 1947). This Law was enacted in accordance with requirements which SCAP officials refused to state in memorandum form. See K. Watanabe, Comments on the Law Relating to the Elimination of Excessive Concentrations of Economic Power, 1947.

[6] The Law relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade (Law No. 54 of 1947) and the Trade Association Law (Law No. 138 of 1948), SCAP Memorandum, 6 November, 1945, above.

[7] Yet even in the early days of the Occupation there were those who suggested that changes in Japanese Corporate Law eventually might be necessary. For example, Dr. Corwin D. Edwards, chairman of a mission studying the Zaibatsu, stated in Pacific Affairs, Sept. 1946:

"Japanese corporation law is so lax that independent stockholders are deprived of opportunity to know what management is doing or to exercise any voice in corporate affairs. The regulations concerning partially-paid stock assist insiders in erecting large structures of control upon a narrow base of ownership and squeezing out independent stockholders when they see fit. If enterprises with diffused ownership are to be prevalent in Japan, protection of the small stockholders' interest and limitation upon the arbitrary power of management will be indispensable."

[8] Law No. 148 of 1948.

mally, the committee chairman offered drafts of revised articles of the code which the committee was invited to consider and, after a proper interval and opportunity for debate as to phraseology and techniques of adoption, was required to adopt without substantial deviation. The ultimate decision whether or not such provision should be adopted was not before the committee. These proposals followed closely the provisions of the Uniform Stock Transfer Act of 1909 and the Illinois Business Corporation Act of 1933, whose use apparently was not a result of the excellence of the legislation of that state but simply of the fact that the particular SCAP officials in charge of revision hailed from Chicago.

Nevertheless, as the deliberations continued, various proposed amendments were suggested voluntarily by the Japanese component of the drafting committee. Those, in general, were revisions necessitated by SCAP's requirements for strengthening of the status of shareholders, those relating to the development of substitutes for the partial payment system for stock which had been abolished earlier, or those pertaining to new financing methods. In point of number, changes inserted upon Japanese initiative probably were greater than those which were directed by SCAP but were the subject of only slight discussion.

Upon completion of a draft incorporating all changes both required of and desired by the Japanese members of the committee, that draft was presented to a reviewing body of scholars, businessmen, lawyers, and officials, nominated by the Office of the Attorney General. This body, called the Legislative Counsel, registered strong objections to certain portions of the proposed draft but also did not succeed in obtaining a relaxation of the Occupation's policies. Reluctantly, the revisions were presented to the Japanese Diet, without change, as a government-proposed bill whose enactment was an occupational necessity.[9] The revised Code was enacted in 1950, but, in the period intervening before its application in July 1951, a last opposition effort within the Diet, using the argument that there was insufficient time for preparation, did succeed in bargaining with SCAP officials for the deletion of several objectionable provisions regarding shareholders' rights and deferred the enforcement of certain other provisions until the end of 1951.[10]

III. Content of Reforms

Classified by substance rather than origin, the amendments to the Japanese Commercial Code made in 1950 fall into three major categories,

[9] See Diet Proceeding Records in connection with enactment.

[10] The Amendment of the Commercial Code (Law No. 209 of 1951) and the Law for Enforcement of the Amendment of the Commercial Code (Law No. 210 of 1951).

namely (a) the rearrangement of corporate powers as between the shareholders meeting, the board of directors, and the corporate auditors, (b) the provision of new methods of attracting and inducing capital investment, and (c) the strengthening of the rights of individual shareholders.

(a) *Rearrangement of Corporate Powers.* Until after Japan's defeat in World War II, corporate shares in Japan were closely held by a small number of individuals or concerns. Following the fragmentation of the Zaibatsu as well as the incidence of heavy capital levies in 1947 which forced the sale of assets, the ownership of shares became much broader.[11] While this dispersal did not occur by a gradual evolutionary process as in the United States,[12] the resulting situation was comparable, and the objectives of subsequent legislation very much the same. With the scattering of ownership, shareholders more and more tended to lose direct contact with the businesses which they owned and to be unable to fill the roll of corporate managers. In the interest of corporate efficiency, a delegation of authority from the shareholders meeting to the board of directors was desirable.

Before the recent amendments, the Japanese Commercial Code afforded unlimited power to the shareholders meeting. Every resolution of shareholders, on whatever subject, bound the corporation.[13] As now amended, the powers of shareholders are limited to matters enumerated by law or stated in the articles of incorporation.[14] Those powers now afforded by law to shareholders are: to amend the articles of incorporation,[15] to decrease the stated capital,[16] to consolidate or dissolve,[17] to approve financial statements and to declare dividends,[18] and to elect directors and auditors.[19] The authority to issue bonds and shares which previously had been held by shareholders[20] was assigned to the board of directors unless otherwise provided by the articles of incorporation.[21]

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[11] For example, the numbers of stockholders of the Mitsui Chemical Co., Ltd., a well-known subsidiary corporation of the Mitsui Zaibatsu, increased from 42 at the end of World War II to 28,555 by February, 1950.

[12] *Cf.* Berle and Means, The Modern Corporation and Private Property (1936) 47 *et seq.*

[13] T. Ishii, Shoho (Commercial Law) Vol. 1, p. 250.

[14] Art. 230–2.

[15] Art. 342.

[16] Art. 375.

[17] Arts. 408, 404.

[18] Art. 283. Note that Japanese law differs from American law in that the power to give formal approval to financial statements and to declare dividends is afforded to shareholders rather than the board of directors.

[19] Arts. 254, 280.

[20] Former Code, Arts. 342, 296.

[21] Arts. 280–2, 296.

The concept of a board of directors as an institution holding and exercising corporate managerial functions did not exist previously in Japanese law. Under former law, every director had a general authority to act on behalf of the corporation and to represent it in transactions, except as otherwise limited by the articles or the resolution of shareholders.[22] As amended, the directors have no such powers individually, but their authority now is exercised collectively as a board.[23] Representation of the corporation is afforded only to representative directors elected by the board, who resemble the officers of an American company.[24] Directors are elected at two-year intervals by the corporate shareholders in general meeting and by a special quorum of one third of the shareholders.[25]

Another innovation which was much debated and opposed by Japanese scholars was the element of cumulative voting. Unless otherwise restricted or prohibited by the articles of incorporation, directors must be elected by cumulative voting upon the request of any shareholder. Even if restricted by the articles, this method of voting must be used if requested by shareholders representing one fourth of all outstanding shares of the corporation.[26] This procedure appears to have been stillborn, for, up to the present, no instances have been reported in which this voting method has been used. Without exception known to the authors, an exclusion of cumulative voting is specified in the articles of incorporation of every Japanese corporation.

The only substantial point of difference which now remains between the Japanese and the American corporate organizational patterns is that of the existence of the auditor. Formerly, Japanese auditors had power to inspect corporate assets, examine the business affairs of the corporation, and to audit and examine financial statements.[27] The recent amendment removes all authority other than that of auditing financial statements and the power of reporting to the shareholders meeting.[28] This provision of law resembles the English Companies Act of 1948, although differing

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[22] Former Code, Art. 261.

[23] Art. 260.

[24] Art. 261.

[25] Arts. 256, 256–2. Previously, the maximum term of office was three years. According to the original proposal of the American component of the drafting committee, the term was to be one year as in American law. The two-year term represents a compromise between the two.

[26] Arts. 256–3, 256–4. These articles also are the product of a compromise between SCAP officials, who pressed for an adoption of this method unconditionally, and the Japanese who opposed it.

[27] Former Code, Arts. 274, 275.

[28] Arts. 274, 275.

from that Act in that a Japanese auditor need not be qualified as a professional accountant.[29] The curtailment of the auditor's powers followed as a result of the increase in the powers of individual shareholders, who were afforded means of acting and investigating on behalf of their corporation.

(b) *New Methods of Corporate Financing.* Until the Zaibatsu were dissolved, the capital requirements of large corporations were met almost entirely by means of issuance of shares to carefully selected subscribers, usually either the banks of Zaibatsu combines or by combine holding companies. With the elimination of the Zaibatsu and the separation of investment and commercial banking,[30] this whole structure disappeared. Japanese corporations became acutely aware that substantial new capital could be obtained only from public investors and on the open market and that new and more efficient financing methods were needed. The amendment in 1948 which eliminated the partial payment system for shares was intended by SCAP as a means of making stock more attractive to small investors, for it was believed that, under the former partial payment system, minority investors might be squeezed out by calculated calls for additional payments if the corporate directors acted on behalf of majority shareholders. The elimination of this provision backfired. It forced a payment in full for all shares, and since the Commercial Code then made no provision for authorized capital stock which could be issued at the directors' discretion, the issuance of new shares could be made only through the cumbersome process of holding a shareholders meeting for the purpose of amending the articles of incorporation.

In the 1950 amendment, the institutions of authorized capital stock, as well as nonpar value stock, were introduced from American corporate law in an effort to provide financing flexibility. Under present provisions, one fourth of all authorized stock of the corporation must be subscribed and paid up in full before incorporation,[31] but the remainder may be issued at any time merely by a resolution of the board of directors.[32] Previously, Japanese law had provided only for par value stock. Now it has progressed one step beyond American law in that unissued but authorized stock may be either par or nonpar at the discretion of the board of directors, unless a limitation is made in the articles of incorporation.[33] The board of direc-

[29] Note however that the Securities and Exchange Law (Law No. 25 of 1948, Art. 193-2) requires that financial statements produced by corporations to which that Act applies must be audited by a certified public accountant.

[30] Securities and Exchange Law (Art. 65).

[31] Art. 166.

[32] Art. 280-2.

[33] Arts. 166, 199. This freedom of choice of the board of directors was provided by the Diet Committee in a last minute revision and in the belief that such authority would be

tors also is free to determine the consideration which a corporation will receive for the issuance of shares without par value and to provide that one fourth of the consideration paid for such shares may be set aside as paid-in surplus.[34] The previous requirement for court approval in event of issuance of shares for consideration other than cash continues.[35] The combined result of these amendments is that the board of directors, rather than the shareholders meeting, now determines the date and consideration for the issuance of authorized stock of the corporation.

Other inducements to corporate investors which are afforded by the 1950 amendment are redeemable stock,[36] stock dividends,[37] stock splitups[38], and transfers from reserves to stated capital[39].

Since previous revisions of the Japanese Corporation Act in 1938 had provided for convertible bonds[40] and stock,[41] and nonvoting stock,[42] it now appears that Japanese corporations have a variety of means with which to seek their new capital requirements. Many of these provisions are as yet not fully explored or generally accepted by corporations or investors.[43]

(c) *Strengthening Shareholders' Rights.* Although encouraging a shift of managerial powers from the shareholders to the board of directors, a building up of the position of the individual shareholder was regarded by SCAP as essential for the attainment of "corporate democracy" and constituted the principal requirement made of the drafting committee. Demands of SCAP in this connection were bitterly protested by virtually all

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convenient. See Diet Proceeding Records. Note the similarity to the recommendation made by Hills in 48 Harvard Law Review (1935) 1352, note 18, that the distinction between par and nonpar value be dropped from the corporate articles since it was no longer a matter of prime importance.

[34] Arts. 284–2, 280–2. Paid-in surplus as well as revaluation surplus, reduction surplus, and other forms of capital surplus may not be the source of dividends (Arts. 288–2, 289) These restrictions are more rigorous than those of American law. Hills, *op. cit.*, 1336.

[35] Art. 280–8.

[36] Art. 222.

[37] Art. 293–2.

[38] Art. 293–4.

[39] Art. 293–3.

[40] Arts. 341–2 to 5.

[41] Arts. 222–2 to 7.

[42] Art. 242. Previously, it was possible to issue nonvoting stock, both common and preferred, up to one fourth of the total outstanding shares. As revised, nonvoting stock can be only of the preferred category. Holders of shares of such stock nevertheless acquire voting rights in event of nonpayment of the preferred dividend and until accrued dividends are paid.

[43] For example, the issuance of nonpar value stock in 1952 by the Mitsui Warehouse Co., Ltd., is the only case known to the authors of the use of nonpar stock to date.

Japanese elements on practical rather than theoretical grounds. Even stockbrokers and others who were dependent on sales to the general public objected that these provisions were of a revolutionary character, and, with hardly a single exception, the scholars of Japan openly opposed these amendments.[44] The SCAP objective of creating legal protections to the minority against illegality, fraud, or unfairness on the part of the majority was recognized as proper, but the Japanese uniformly felt that the measures required would encourage shareholder-strife and hamper honest management.

Such opposition did not dampen SCAP paternalistic ardor, and upon SCAP "suggestion" the following steps were taken to strengthen the rights of minority shareholders:

1. *Voting Rights.* Voting rights at a shareholders meeting were strengthened through the abolition of restrictions on voting rights in articles of incorporation,[45] the recognition of cumulative voting and the prohibition of a general proxy,[46] the provision of severe quorum restrictions, and requirements for resolutions which, like cumulative voting, can be set aside only by means of a specific provision to that effect in the articles of incorporation.[47] Other rights given to shareholders were the rights of appraisal which afford a dissident shareholder an opportunity to demand payment for his shares in case of a transfer of corporate assets and consolidations or mergers.[48]

2. *Direct Controls.* A shareholder was given certain direct controls over management in cases of illegality or unfairness. In this connection, the thorniest issue was that of the right to inspect the files and books of a corporation. Under previous law, shareholders had no right of access to corporate records beyond the opportunity to approve the annual financial statement at a shareholders meeting.[49] Under the amendment of 1950, shareholders having more than one tenth of all outstanding shares of a corporation are given a right to examine the corporate books of account

[44] *Cf.* Matsumoto, Kaisha Ho Kaisei Yoko Hihan (Critique of the draft of the Amendment of Corporation Law), Horitsu Jiho, vol. 22, No. 4.

[45] Art. 241. Previously, the voting power of a shareholder having eleven or more shares could be limited by the articles of incorporation to a degree less than his ownership would otherwise warrant. For example, owners of 20 shares might be afforded only 15 votes, owners of 30 shares, 20 votes, etc. Formerly, it was also possible to limit the right of a shareholder to vote until six months after his acquisition of shares.

[46] Art. 239.

[47] Art. 239. Even this opportunity to set aside quorum restrictions is not afforded in certain special cases, such as the elections of directors (Article 256–2) and the amendment of the articles of incorporation (Article 343).

[48] Arts. 254–2 to 254–4, 408–2.

[49] See footnote 19, *supra*.

and records and make extracts therefrom.[50] The one-tenth requirement is an amendment inserted by the Legislative Counsel which refused to accept the original draft giving such right without limitation to every individual shareholder. Now directors are entitled to refuse access only in a few specifically provided situations.[51] Another provision of the 1950 amendment was that directors must prepare and make available to every shareholder financial reports for every accounting period, stating in reasonable detail the change in financial conditions during the period, specifying the increase and decrease of stated capital and reserve funds, and also enumerating all transactions with directors, auditors or shareholders, mortgage creditors, etc.[52] Fiduciary responsibilities of directors to their corporations have been established, and the liabilities of directors for improper acts have been increased. Also, director liabilities cannot be released or satisfied except by unanimous consent of all shareholders.[53]

Liabilities of directors may be enforced by shareholders' representative suits, injunctions, or actions instituted by minority shareholders to force resignation.[54] Any shareholder who has been a shareholder for six months may institute an action against a director on behalf of the corporation, either within thirty days after the date on which he has demanded such action of the director or in case of emergency.[55] This replaces a much less effective system whereby an auditor, upon the demand of minority shareholders whose request had been refused at a shareholders meeting, could bring action directly.[56] Now when a director makes an ultra vires act or any illegal act and thereby gives rise to a reasonable fear that irreparable damage will be done to the corporation, any shareholder having the same six-months qualification may demand on behalf of the corporation that the director refrain from such acts and, if necessary, take such a demand to a court.[57] Formerly, a similar right existed in emergencies when minority shareholders, after demanding a shareholders meeting for the purpose of removing directors, could bring action in court to enjoin all acts by such directors.[58]

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[50] Art. 293–6.

[51] Art. 293–7.

[52] Arts. 293–5, 283.

[53] Arts. 254–2, 266.

[54] Art. 257. An action to force a resignation may be instituted only when a majority of the shareholders have rejected the removal of a director, notwithstanding dishonest or illegal conduct of such director.

[55] Arts. 267 to 268–3.

[56] Former Code, Art. 268.

[57] Art. 272.

[58] Former Code, Art. 272.

3. *Property Rights.* The property rights of a shareholder have been strengthened by a provision that no restriction or prohibition even in the articles of incorporation shall bar free transfer of shares.[59] This provision is broader than that of American law in that it applies even in cases where reasonable grounds for limitation exist. Should a majority of the shareholders wish to restrict the transfer of shares, this can be done only through the reorganization of their corporation into a "corporation of limited liability," which resembles the private company of English law.[60]

Another provision of the new act relates to pre-emptive rights. The amendment of 1950 introduced a unique and extremely troublesome requirement that a corporation provide in its articles of incorporation for the existence, restriction, or exclusion of pre-emptive rights to authorized but unissued shares of a corporation.[61] This provision is the unfortunate result of a compromise reached between the SCAP component of the drafting committee, which advocated the recognition of a general pre-emptive right as provided in Illinois,[62] and Japanese members who wished to provide such rights only in cases when the corporation's articles so specified. In this connection and in support of their position, the Japanese members pointed unsuccessfully to a provision of California corporation law,[63] which unfortunately lacked the persuasive power of provisions of Illinois law. Certain changes in the transfer of shares were provided along the lines of the American Uniform Stock Transfer Act, with the important exception that transfers are valid in the hands of a bona fide purchaser even though assignment or endorsement signatures are forged.[64] The transfer agent and the registrar were also introduced into Japanese law.[65]

IV. Acceptance

The reaction of the Japanese business and legal world to the amendment of 1950 has been vocal and uniform. Amendments requested by Japanese committeemen have been generally approved. Japanese corporations have taken quite well to provisions for new managerial organization and are heartily appreciative of new methods of financing which the law affords,

[59] Art. 204.

[60] Termed a Yugen Gaisha and governed by Law 74 of 1938.

[61] Arts. 166, 347. Previously, the issuance of shares could be effected only at a shareholders meeting by an amendment of the articles of incorporation which increased the capital stock. On such occasions, provisions for pre-emptive rights were made in the resolution for the amendment. See former Code, Art. 348.

[62] Illinois Business Corporation Act, Sec. 24.

[63] California General Corporation Act, Sec. 1106.

[64] Arts. 205, 206, 229.

[65] Arts. 206, 307.

even though not yet fully applied. Insofar as changes in these features are concerned, the revision of 1950 is highly successful.

Almost equally and as uniformly, Japanese have opposed the new remedies of shareholders which are patterned on the classical remedies of the United States. The requirements for the amendment of corporate articles to provide for pre-emptive rights, and the need to exclude or limit cumulative voting and to provide for the quorum of shareholders, have necessitated the revision of the articles of incorporation of every corporation in Japan, which has caused great inconvenience to registry offices and expense to corporations which have been forced to hold special meetings for this purpose. To practicing attorneys, of course, these requirements have constituted a windfall.

The remedies of shareholders which are the cause of such criticism are accepted and acknowledged to be sound in theory, and if properly interpreted and applied by courts trained to act and having practical knowledge of corporate management, they might eventually be generally accepted. Unfortunately, in Japan the present judiciary finds such cases strange, and there is no supporting body of tradition or flexible case law comparable to that in England and the United States.

Another unfortunate result of the strengthening of individual shareholder rights has been an increase in the use of blackmailing tactics on the part of professional agitators and, at times, an improper exertion of pressure by labor representatives. Quite frequently, it seems, managers of Japanese corporations have, with the tacit consent of their boards of directors, used their authority in ways which might be questioned or might appear to afford them personal advantage. The new and powerful remedies of stockholders afford to the individual, with inside information and the desire, an opportunity to force concessions from corporate management. The view that blackmail is best cured by the elimination of sin is, of course, a sound one, but it does not provide much comfort to corporations whose managers are pressed for hush money or for concessions beyond what would result from direct bargaining.

Actually, the need for a strengthening of the individual shareholder's position, which SCAP asserted, does not now exist in Japan. Blue Sky laws such as the Security and Exchange Act of 1948,[66] the Investment Trust Act of 1951,[67] and the Corporate Reorganization Act of 1952,[68] afford effective protection against abuses far beyond the shareholder rem-

[66] Law No. 25 of 1948.
[67] Law No. 198 of 1951.
[68] Law No. 172 of 1952.

edies for self-defense of the revised Commercial Code through measures based on the principle of full disclosure to a regulatory body.[69]

At the present time there is a strong clamor for revision of corporation law.[70] Recommendations are divided. There are a few who would abolish entirely the provisions of the Act of 1950 and who denounce it as a dictated piece of legislation. There are many who would preserve those revisions relating to corporate finance and corporate management, but would eliminate or greatly restrict the remedies of individual shareholders. It would appear likely that the elimination of some of the modifications of the revision of 1950 will be made within the near future.

One final criticism of the revision of 1950 should be made. The provisions of the act were prepared by a small committee, in considerable haste, and without the benefit of general public discussion. In many instances, the hearts of the Japanese committee members were not in their work, and the forcing tactics of the occupation authorities were resented. The draftsmanship of the code has suffered, and new articles are far below the editorial standards set in previous versions of the Commercial Code. Frequently, new provisions suggest grammatically that they are of foreign origin, and the presence of such foreign elements in the phraseology has undoubtedly had something to do with the opposition of the Japanese legal world. Whatever the fate of the substance, at least the form of recent revisions should be adjusted to harmonize with the prevailing high standards of Japanese codes.

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[69] Previously, an independent Securities and Exchange Commission existed to which reports were made. It was abolished and its authority transferred to the Ministry of Finance in July, 1952.

[70] For example, the Japanese Chamber of Commerce has enacted resolutions to that effect.

JOAQUÍN GARRIGUES

Law of Trusts[1]

So vast is the field of the law of trusts in modern life, that I can at best select only a few of its aspects which seem to me to be of particular interest to my colleagues of the International Bar Association. I deem it advisable not to attempt consideration of theoretical problems of the trust institution in Anglo-American law, taking it for granted that it is sufficiently well-known for my present purpose, or of questions of private international law.

This paper is limited then to a consideration of the possibility of adapting the trust to a legal system of Romanic type, such as is the Spanish. This brief study is divided into three parts: the reception of the idea of trust in the various legal systems; the attempts to incorporate the trust in Romanic systems of law; and the trust from the point of view of Spanish positive law and the decisions of our courts.

I

Reception of the Idea of Trust in the Different Legal Systems

From the days of Roman law down to the present day, the advantages derived from placing our rights or our property in the hands of another person to be used not for his own benefit, but for our benefit or for the benefit of a third party, or simply to carry out some particular purpose, have been availed of under adequate legal institutions which have undergone evolution through a long period of time in accordance with the spirit of each people. The idea of the trust in its literal meaning of *fiducia* constitutes the basis of the so-called *pactum fiduciae* and of the *fideicommissum* in Roman law. The *pactum fiduciae* implies a transfer of property for purposes limited to management or security. The Roman pact of *fiducia* is made up of two structural elements: the real, consisting of the transfer of the property, and the personal or contractual, by virtue whereof the fiduciary assumes an obligation to return the property to the trustor or *fidei-comitente* upon fulfilment of the conditions for such restitution. This

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Joaquín Garrigues, of the Madrid Bar, is Professor of Commercial Law, University of Madrid, and editor of the Revista de Derecho Mercantil.

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double element still subsists in the "fiduciary transactions"[2] of our modern life, in which it is characterized, in effect, by an internal disharmony between the end contemplated by the parties (mere security or the conservation of the thing) and the legal means employed to effect that end (transfer of the property right in the thing). A stronger legal effect is caused in order to achieve a weaker economic end. There is in short a contradiction between the end and the means employed, energetic means being employed to obtain a more restricted result. It is precisely to obtain the end result in contemplation that the contractual obligation is assumed for the purpose of emasculating the normal legal consequences of the transfer of the property. In the law of succession, the Roman *fideicommissum*[3] consisted of a charge imposed by the testator on a person in confidence to conserve the property received as heir or legatee and transfer it to a third person. An important fact to be noted is that the person who was to receive the benefit (the *fideicommissarius*) was originally given no coercive legal remedy whatsoever to compel the person so charged (*fiduciarius*) to carry out the wishes of the testator. Likewise it is to be noted, neither did the *pactum fiduciae*[4] give rise to an action at strict law but only

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[2] *I.e., negocio fiduciario*, in Italian *negozio fiduziario*, a topic that has received ample attention in the literature of the Latin countries, especially in Italy. See Franceschelli, Il "Trust" nel Diritto Inglese (Padua 1935) ch. 2, p. 10 *et seq.*, and Goldschmidt, "Trust, Fiducia y Simulación," La Ley (Buenos Aires) August 7, 1952, p. 1, with bibliographical footnotes.

[3] *Fideicommissum.* In the civil law, a species of trust; being a gift of property (usually by will) to a person, accompanied by a request or direction of the donor that the recipient will transfer the property to another, the latter being a person not capable of taking directly under the will or gift (citing Louisiana and Texas cases). Black's Law Dictionary. The Siete Partidas reproduced the *fideicommissum* in these words: "*Fideicomissaria substitutio*, in Latin, means, in Castilian, the appointment of an heir which is made with the belief of anyone that he will deliver to another party the inheritance which he leaves in his hands, as if the maker of the will should say: 'I appoint So-and-so my heir, and I request, ask, or direct that he hold this my estate which I leave to him, for such-and-such a time, and that afterwards he give and deliver it to So-and-So.' An appointment like this can be made by any one of the people, provided he is not forbidden to do so by any of the laws of this our book. We decree, however, that he who is requested and appointed in this way must give and deliver the estate to the other party just as the testator directed, deducting the fourth part of the same which he himself is entitled to keep. This fourth part is called *trebellianica*. If the party appointed in this way as heir should not be willing to accept the property or, after he has accepted it, should refuse to deliver it to the other, the judge of the district can compel him to do so." Part. 5. Tit. V, Law XIV (Scott's Translation (1931) 1216).

[4] *Fiducia.* In Roman law, an early form of mortgage or pledge, in which both the title and possession of the property was passed to the creditor by a formal act of sale (properly with the solemnities of the transaction known as *mancipatio*) there being at the same time an express or implied agreement on the part of the creditor to recover the property by a similar act of sale provided the debt was duly paid; but in default of payment, the property became absolutely vested in the creditor without foreclosure and without any right of redemption. Black's Law Dictionary.

to an *actio bonae fidei*, the scope of which was left to the equitable discretion of the judge. The *fiducia* thus came to be the first contract in Roman law which did not generate literal and strict obligations; its content varied with the tenor of the circumstances and the criterion of a *vir bonus*.

Under the driving impulse of practical life, the idea and the technique of the Roman *fiducia* have taken root in the law the world over, but in very diverse forms, the institution varying in degree and meaning.

In England, fiduciary institutions obtained ample growth largely due to a distinction of norms which were foreign to the continental law but are perfectly adapted to the inner nature of the fiduciary institution: the distinction between *common law* and *equity*. Evolving from the ancient institution of the use, the trust is based on a dual dismemberment of the title *in rem* of the thing given in trust. The trustee as the legal owner is authorized and under a duty to administer the thing as a consequence of a right of his own, in his own name and under his responsibility, but in the interest of the settlor who makes the transfer or of the person—the *cestui que trust*—whom the settlor desires to benefit. A form of ownership is consequently involved which belongs to two persons at the same time in such wise that one of these owners, the trustee, is under a duty to exercise his rights for the benefit of the other (*cestui que trust*). The property right of the trustee is subject to the common law and is therefore a legal right. The property right of the beneficiary is subject to equity and is therefore an equitable right. But the institution of the trust, both in its country of origin and in North America, has attained a scope of far wider range than the *pactum fiduciae* for purposes of management or security. It constitutes rather a general principle for the application of the law in all cases where equity requires regard for the interests of others as against the formally legitimized position of the holder of a legal title. In this sense, nevertheless, the structure of the trust is reminiscent of the Roman law distinction between *judicia stricti juris* and *judicia bonae fidei*.

On the other hand, a formal recognition of the *fiducia inter vivos* was never attained in the law of Romanic type countries, and the hereditary *fiducia* was recognized only subject to substantial restrictions. These restrictions drew their inspiration from a desire to avoid entail of real property. In the Spanish Civil Code, the hereditary *fideicommissum*, despite its name, implies no relation of confidence or trust, since the conduct of the fiduciary heir as to the conservation and devolution of the inheritance is taken care of and secured by the statute itself and it is precisely the statute which denies all effect to a *fideicommissum* of confidence or trust, properly speaking, under which all or a part of the hereditary property is left to a person to apply or invest pursuant to instructions

received from the testator (article 785, par. 4, Civil Code).[5] And article 781 of the said Code prescribes that fideicommissary substitutions by virtue whereof the heir is charged with the duty of keeping the whole or part of the inheritance and transmitting it to a third party shall be valid and effective, always provided they do not go beyond the second degree or they are made in favor of persons living at the time of the death of the testator.

Nevertheless, the "fiduciary transaction" continued alive in countries of the Romanic legal system, sometimes within the law, sometimes outside of it, in the ambit of both civil law[6] and commercial law, but with greater intensity in the latter.

In civil law, the idea of *fiducia* furnishes the basis for a variety of institutions. This occurs in *inter vivos* transactions, for example in the case of an agent who acts in his own name, in the appointment of an attorney to sell the mortgaged premises in an extrajudicial mortgage foreclosure,[7] and in the adjudication of property in payment of debts.[8] In the field of dispositions *mortis causa*, a fiduciary relation is recognized in the case of

[5] Art. 785. The following shall produce no effect . . . 4 (Fideicommissary substitutions) the object of which is to leave a person the whole or part of the hereditary estate in order to apply or invest it in accordance with secret instructions given him by the testator.

In this and the following articles of the Spanish Civil Code, the translation has been taken or adapted from Sinco, The Civil Code (Manila, 1947) or Fisher, The Civil Code of Spain (5th ed. Manila, 1947).

[6] The expression "civil law" is used here of course to refer to the general body of private law in contraposition to the matters specifically dealt with in the commercial codes or other special codes.

[7] Extrajudicial foreclosure is permissible in view of article 1255 of the Civil Code, pursuant whereto there is full liberty of contract and the validity of all pacts that are not in conflict with statutory law, morality, or public policy is recognized. Accordingly, the parties may provide for and regulate extrajudicial foreclosure. If it be provided for in the contract without detailing the procedure, the following rules are applicable. Notice is given to the debtor, mortgagor, and possessors by demand or notification through a court or notary, and proof of service is filed with the Registrar. Twenty days after the final notice and demand, and after publication in the Official Bulletin and local newspapers, a public auction is held on the basis of the valuation fixed in the instrument of mortgage. If there are no bidders at the first auction, a second auction is held, and if there again be no bidders, the mortgaged property is "adjudicated" to the creditor, who must give a receipt in full and pay over the difference, if any between the amount due and the base price. If the debtor or owner refuse to execute a deed, the notary can execute it in his name. The consent of the attorney entrusted with the fiduciary duty of carrying out the sale is required. (It is to such attorney that Dr. Garrigues' text refers.) It is accordingly necessary that such an attorney or agent be appointed in the mortgage instrument. The deed is recorded and serves the dual purpose of a satisfaction of the mortgage and a title deed for the new owner. This extrajudicial procedure cannot be resorted to when third parties file opposition in the registry office. 27 Enciclopedia Espasa, 1737, *sub voce Hipoteca.*

[8] Adjudication of property in payment of debts is the judicial act pursuant to which property of the debtor is applied to the creditor in a summary execution suit, in payment of the

administrators, accountant-partitioners,[9] testamentary executors, and trustee-heirs (*herederos de confianza*).[10]

The fiduciary institution has reached its greatest development, however, in the field of commercial law. Among other examples may be mentioned: the case of indirect representation as a means of realizing the *fiducia* for purposes of management; transfers of shares of stock for the exercise of voting rights by banks with whom the shares are deposited; the appointment of a pool manager (*síndico*) to vote the shares included in a pooling agreement;[11] the case of what is really a mortgage or a pledge of a mercantile enterprise the title to which is transferred to a creditor who appears, as to third parties, as the sole owner; the so-called "fiduciary companies" of which we find numerous examples in several European countries (*Deutsche Treuhandgesellschaft; Società Fiduciaria Svizzera*, founded in 1906; *Revisionsbund Bernischer Banken und Sparkassen*, founded in 1912), or the investment trusts organized in Europe in imitation of North American practice. It is especially in the sphere of banking that we find an infinite variety of instances in Continental law where the idea of the trust is applied as a means of obtaining the management of securities

debt. It is availed of when a judgment-debtor has no money, salary, pension, or credits with which to satisfy the judgment, but owns other personal property or real property. In such case, the property is sold at auction under the execution, and if there be no bidder, the creditor has the right to have the property adjudicated to him in payment of the judgment for two thirds of its appraised value. The creditor is given various options, among others to be entrusted with the possession and management of the property until his claim has been satisfied out of the proceeds. In such case, he acts in a fiduciary capacity. 2 Enciclopedia Espasa 913, *sub voce Adjudicación*; arts. 1479–1529, Law of Civil Procedure. And see note 7, *supra*.

[9] It is common practice in Spain for a testator to designate the executors or other persons as accountant-partitioners (*contadores-partidores*) to inventory and appraise the property of the estate and distribute it among the heirs, judicial approval being normally unnecessary. The rules relating to executors are in general applicable to these accountant-partitioners. 42 Enciclopedia Espasa, 375, 376, *sub voce Partición*.

[10] An institution of the private law of Catalonia and very common in practice. It consists of leaving the inheritance or legacy to a person (*confidenciario, heredero de confianza*) to carry out secret orders given him by the testator orally or in writing. Its nature is that of a very special *fideicommissum* in which the trustee is only an agent and depositary. It should therefore not be confused with the *fideicommissum* which entails restitution (conveyance) of the property. Under a *fideicommissum*, the holder is full owner and receives the inheritance for his own benefit during his lifetime under an obligation to leave it in whole or in part at his death to a specified person, whereas the *heredero de confianza* does not receive the inheritance for his own benefit but for the benefit of a third person who is expressly determined only in secret. The institution is one of customary law. . . . The authorities are in conflict as to the admissibility and advantages of the institution. . . . By reason of these disadvantages, such an institution should either be prohibited or else regulated in such wise as to eliminate these dangers. . . . 27 Enciclopedia Espasa, 1171 *et seq.*, *sub voce Herencia*. This part of said article details rather fully the rules governing the institution.

[11] See Pedrol, La Sindicación de Acciones (Madrid, 1952), which includes a chapter (No. 24, p. 179 *et seq.*) on our voting trusts.

through the intervention of banks. We also find the mechanism of the trust employed in the issue of mortgage bonds, a trustee being appointed who receives the security, constituted by the debtor enterprise, for the benefit of the bondholders. An indenture of this kind was entered into in Mexico at the time of the foundation of the National Railways in 1908, that is to say, long before the institution of the trust was introduced by statute in that country.

Now, in none of these instances in which countries of Romanic Law, in or out of Europe, have taken to the idea of the trust, do we find in the statutes any legal provision adequate to define the relation and to delimit the rights and duties of the constituent of the trust, of the trustee, and of the beneficiary, still less the consequences of a breach of trust by the trustee. In other words, the law of Romanic type countries remains, in respect to the fiduciary transaction, in a situation not dissimilar to that of the use in English law before the trust was known. Romanic law adopts an attitude of neutrality towards the trust. It is limited to offering the parties in interest, on the one hand, the rules which regulate the transfer of the property of things and, on the other hand, the general rules of contracts which compel a contracting party to perform his agreement. But the beneficiary is given no energetic protection when the trustee's conduct fails adequately to live up to the duty of fulfilling the purposes for which the trust was constituted.

II

Attempts to Incorporate the Trust in Romanic Legislation

The needs of business life which make it advisable legally to naturalize the trust institution in Romanic type law have led the legislatures in some countries to enact special statutes incorporating the Anglo-American institution into their law. In this manner, the pure fiduciary transaction which was to be found in usage in these countries at the margin of the law ceases to be a fiduciary transaction in the strict meaning of this expression, since by converting the pure *fiducia* into a statutory *fiducia*, it ceases to be a *fiducia* in the technical meaning of the term, that is to say, a relation which is founded, not under the tutelage of the law, but solely on the confidence which we repose in another.

These legislative attempts are most interesting. They can serve as a touchstone for countries which have not yet accorded statutory recognition to the trust institution. The countries whose legislatures have granted naturalization papers to this institution, under the influence of Anglo-American concepts and legal mentality, are: in America, Mexico, Puerto

Rico, Panama, and the Province of Quebec, Canada; in Asia, Japan; and in Europe, Liechtenstein. Within the brief limits of this article we cannot enter upon an examination of these statutes, but must confine ourselves to a brief comment on a few of them sufficient to show the great difficulties which are met in assimilating the trust in countries whose law draws its inspiration from the Roman legal tradition.

In the law of the Province of Quebec of 1879, the trustee is deemed a "depository or administrator". This ignores the essential difference between the true trust and the deposit whereunder there is no transfer of ownership, at least in the so-called "regular deposit."[12] The 1926 law of Liechtenstein attempted to harmonize the Germanic concept of the *Treuhänder* with the Anglo-American concept of trust. The result is a hybrid regulation which at times applies the rules of agency and at other times prescribes that the trustee shall not be subject to the continuing instructions of the settlor. The Mexican law of Securities and Credit Operations of August 26, 1932, it is true, corrected some of the defects of the 1926 Law of Credit Operations on the regulation of trusts. Nevertheless, it reveals substantial defects, commencing with the definition of the trust which omits the fact that it is an act which transfers property.[13] This statute is limited to regulating the express trust. Its authors were of the opinion that there are institutions in the Mexican system sufficient to meet the purposes contemplated in the Anglo-American system by implied trusts or those resulting from operation of law—resulting trusts and constructive trusts. If to this we add that the statute fails to define the rights of the beneficiary or the duties of the trustee and that the provisions as to the transfer of the trust *res* by the trustee to a third party are very vague and incomplete, it will be readily understood that the trust has undergone many essential limitations and modifications by its incorporation into Mexican law. These have converted the institution into an experiment the utility of which is still in doubt.[14] It is perhaps for this reason that a distinguished Mexican jurist, Oscar Rabasa (*El Derecho Anglo-*

[12] "Bailment (*depósito*) is constituted when one person receives a thing belonging to another under the obligation of taking care of and returning it." (Spanish Civil Code, art. 1758). This is the "regular deposit". Where the depositary, as for instance a bank or warehouseman, may return other property of equal value or kind, the deposit is sometimes called "irregular deposit." The Spanish Civil Code (art. 1768) provides: "When the depositary is given permission to use or employ the thing deposited, the contract loses the character of deposit and is converted into a loan or *commodatum*."

[13] "By virtue of the trust (*fideicomiso*), the creator destines certain property to a specified licit purpose, entrusting the realization of such purpose to a fiduciary institution." Article 346, General Law of Securities and Operations of Credit, Mexico.

[14] The translator, on the contrary, is of the opinion that the trust has already proven itself of substantial practical value in Mexico.

Americano (1944) p. 298) recognizes that the efforts which have been made to import the trust or *fideicommissum* of the Anglo-American type have been essentially frustrated, since the institution so established is either a hybrid product or acquires the form of a juridical act deprived of virtue and completely different from the model it intended to adopt.

III

The Trust in Spanish Positive Law and in Our Courts

No precept of positive Spanish law prohibits the typical fiduciary transaction, that is, a transaction which combines a positive act of real transfer to the fiduciary, the effects of which are simultaneously tempered by an agreement which obligates the fiduciary to make use of the thing so acquired pursuant to instructions given by the trustor. The legal validity of the fiduciary transaction has been recognized in several judgments of our Supreme Tribunal of Justice (March 10, 1944,[15] May 25, 1944,[16] and January 28, 1946[17]).

[15] *Trustee in Bankruptcy of Concustill Senlihy v. Moro Vallejo*, 6 Jurisprudencia Civil, 2d Series, March–May 1944, pp. 124, 146. No. 12. By a public notarial instrument in 1930, duly recorded, Concustill sold to the defendant a one-fourth interest in a flour mill. A simultaneous private instrument showed that the transfer was merely for purposes of security. The debtor became an involuntary bankrupt in 1935. The lower court held the deed of sale void as fictitious, "simulated," against third parties including the trustee. Reversed. *Held*, the bankruptcy law providing for annulment of transfer made only within two years prior to the bankruptcy, the transaction in question, being not simulated but genuinely expressing the will of the parties, was valid and the trustee in bankruptcy had no claim (Article 1255 providing liberty of contract and article 1230 that counter-declarations are valid as between the parties, relied on to support the decision).

[16] *Pérez López v. Navarro Arranz*, 6 Jurisprudencia Civil, 2d series, March–May 1944, p. 788. No. 88. Suit to enforce a contract to pay rent and to have title to new property registered in the debtor's name. A public instrument recited a loan of 50,000 pesetas secured by mortgage. The mortgage in fact was to secure past advances. *Held*, that while the existence of a *causa* is an essential element of a contract, a lack of congruity between the real intention and the intention declared in an instrument or incongruity between the legal structure and the economic purpose intended does not necessarily make the transaction ineffective; indirect transactions and fiduciary transactions not involving fraud against the law are valid.

[17] *Vera García v. Rivas Rubio*, 13 Jurisprudencia Civil, 2d series, Jan.–March 1946, pp. 212, 238, No. 29. Action to annul a deed of conveyance of a shoe factory and business given to a creditor in consideration of a small purchase price and the assumption of the heavy liabilities of the business. There had been during the course of many years a long series of complicated transactions and public and private instruments. Plaintiff alleged the deed of conveyance was a fictitious simulation and the consideration (*causa*) false, and the court of first instance so held. *Reversed*. The supreme Tribunal, citing prior decisions, held it to be not a fictitious transaction but a fiduciary transaction consisting of two contracts, one of transfer and one of security "because the *fiducia*, in the typical hypothesis of an irrevocable transfer of the property conditioned upon the obligation of the fiduciary to use his rights within the limits agreed upon, reveals the intention of the parties, shows the impossibility of attacking on the ground of simulation a transaction that cannot be characterized as simulated

But in order to convert the fiduciary transaction into a true trust, it is necessary to provide the beneficiary and the trustor with adequate remedies and to attribute effects *in rem* to their rights in the trust *res*. Until this is done, the fiduciary will appear as the full title-owner, and recording in the public registry will accredit him as owner as to third persons, although his record title is internally limited by the pact of *fiducia*; this pact, as engendering purely personal obligations, can find no place in the registry. It is this transit from the *fiducia* of Roman type to the statutory *fiducia* or trust which meets with enormous difficulties in legislation of Romanic type.

The first of these difficulties lies in the fact that the dual division of title into formal or legal ownership and the substantial or bonitary ownership is essential to the trust. (Recall, *inter alia*, Story's definition of the trust).[18] This division of title *in rem* rested in turn on the duality of substantive and procedural law peculiar to the Anglo-American system. Under this system, the property rights of the trustee are subject to the common law, while the rights of the *cestui que trust* are subject to equity. If this duality of title in the trust be eliminated, it becomes impossible to distinguish the institution from other somewhat similar institutions: mandate, lease, bailment, representation (agency), etc.[19] This is perhaps the reason why the statutes I have mentioned have been forced, in configuring the trust, to resort to the traditional concepts of Roman law (mandate, administration, deposit, etc.).

The second difficulty lies, in respect to the trust *mortis causa*, in the limitations which Spanish law, like other similar Romanic laws, imposes on fideicommissary substitutions (article 781, Spanish Civil Code[20]), and on the true *fideicommissa* (article 785, par. 4, Spanish Civil Code[21]). There

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and leads to the logical conclusion that the obligation, contracted by the fiduciary (supposing the irrevocability) of what is technically called a real positive contract, can only be enforced at the time and in the manner agreed upon. It cannot be enforced on the terms claimed in the complaint and subsequent pleadings." In all these cases, the debtor's "equity of redemption" was recognized.

[18] "A trust, in the most enlarged sense in which that term is used in English Jurisprudence, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits or benefits thereof in his hands, belong wholly, or in part, to others." 2 Commentaries on Equity Jurisprudence, s. 1304, p. 648 (14th ed. Lyon, 1918).

[19] But *cf.* the Louisiana Trust Act.

[20] "Fideicommissary substitutions, by virtue of which the heir is charged with the preservation and transmission to a third person of the whole or part of the inheritance, shall be valid and effective, provided they do not go beyond the second degree, or they are made in favor of persons living at the time of the death of the testator.

"Art. 782. Fideicommissary substitutions can never impair the *légitime*. . . ."

[21] *Supra*, note 5.

are other barriers in our system of succession that the trust institutions cannot overcome. There is the system of *légitimes* which imposes a prohibition on testators against disposing of that part of their property which is reserved by law for certain forced heirs (articles 806[22] and 807[23] of the Civil Code, in relation with article 636[24] which prohibits a gift of that which cannot be disposed of by will). There are also the statutory prohibitions against the execution of wills by an agent or deputy under article 670[25] of our Civil Code; and the prohibition of agreements respecting future inheritance (article 1271, par. 2[26]).

It is for such reasons as these that some decisions of the courts have shown resistance to the importation of the trust into French law (see Weiser, *Trusts on the Continent of Europe* (London, 1936) p. 60) and that other decisions, while recognizing foreign trusts, have nevertheless assimilated them to agency, deposit, executorship, etc. (see LePaulle, *Traité théorique et pratique des Trusts en Droit Interne, en Droit Fiscal et en Droit International* (Paris, 1932) p. 367).

In fact, many of the functions served by the trust in Anglo-American law are satisfactorily performed in our law by means of other institutions,

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[22] "*Légitime* is that part of the property of which the testator cannot dispose because it is reserved by law for certain heirs, called on that account, forced heirs."

[23] "The following are forced heirs: 1. Legitimate children and descendants with respect to their legitimate parents and ascendants; 2. In default of the foregoing, the legitimate parents and ascendants, with respect to their legitimate children and descendants; 3. The widower or widow, the natural children legally acknowledged, the father or mother of the latter, in the form and proportions established by articles 834, 835, 836, 837, 840, 841, 842, and 846".

The amount of the *légitime* varies according to the degree of relationship. Article 808, for instance, provides: "The *légitime* of legitimate children and descendants consists of two thirds of the hereditary estate of the father and of the mother. However, the parents may dispose of one of the two thirds forming the *légitime* in order to apply it as a betterment (*mejora*) to their legitimate children and descendants. The remaining third part shall be at their free disposal."

"Art. 813. A testator cannot deprive the heirs of their *légitime* except in the cases expressly determined by law. Neither can he impose upon it any burden, condition or substitution of any kind, always excepting the provisions concerning the usufruct of the surviving spouse."

It may be significant that the two republics which have adopted the trust (Mexico and Panama) permit freedom of testation.

[24] ". . . no person can give or receive, by donation, more than what he can give or receive by will. A donation shall be considered inofficious in all that exceeds such limits."

[25] "A will is a highly personal act; the making of it cannot be left, in whole or in part, to the discretion of a third party nor can it be made by a deputy or agent.

"Neither can there be left to the discretion of a third party the permanency of the appointment of heirs or legatees, nor the designation of the portions they are to take when they are instituted by name."

[26] ". . . no contract can be made in respect of a future inheritance other than those whose object is to make a division *inter vivos* of an estate pursuant to article 1056."

such as foundations (article 35, Spanish Civil Code[27]), gifts, and legacies under modal charge (articles 619, 797 and 798[28]), adjudication of property under the obligation to transfer it to another (article 2, No. 3, of the Mortgage Law[29]), executorship (articles 892 *et seq.* of the Civil Code), fideicommissary substitutions (article 781, Civil Code[30]), and others.

Nevertheless, it must be recognized that the institution of the trust plays a very important role in business affairs, especially in banking. Consequently, it may well be advisable to adopt in the legislation of Romanic type a *fideicommissum* or trust similar to that of the Mexican statute restricting the capacity to act as trustee to credit institutions. We should however, forego the attempt to introduce the trust in the field of inheritance.

In résumé: we deem it dangerous to incorporate fully in our law an exotic institution like the Anglo-American trust which answers to a tradition and to a mentality wholly different from our own. We admit that it offers great advantages in some cases, but we believe that legislations of the Romanic type, elaborated through the course of centuries by well purified doctrines and techniques, possess institutions which can resolve many of the problems that the trust institution set out to meet and that these solutions can be found within the eurythmy of a harmonious system of law.

[27] "The following are juristic persons: corporations, associations and foundations of public interest recognized by law."

Article 39 includes a doctrine analogous to our *cy pres*. The provisions of the Civil Code on foundations are deficient. They are defined in 25 Enciclopedia Espasa, p. 185 as "a class of moral, not physical, juristic persons formed by a manifestation of the will of a person who dedicates sufficient property belonging to him to the realization, in a permanent manner, of a licit human purpose in favor of certain other persons." They stem from the *causas pias* of Roman law. For an excellent comparative study see Escarra, Les Fondations en Angleterre (Paris, 1907).

[28] "Art. 619. . . . a donation is also what imposes upon the donee a charge inferior in value to the thing donated."

"Art. 797. The statement of the object of the institution or of the legacy or the application to be given to what has been left by the testator or the charge imposed by him shall not be considered a condition unless it appear that such was his intention. What has been left in this manner may be claimed immediately and is transmissible to the heirs who may give security for compliance with the directions of the testator and the return (repayment) of what they may receive with its fruits and interest should they fail to comply with the obligation."

"Art. 798. When without the fault or personal act of the heir or legatee, the institution or the legacy dealt with in the preceding article cannot take effect in the very terms ordered by the testator, it should be complied with in terms as nearly analogous and in conformity with his intention as possible." (Note here another application analogous to *cy pres*.)

[29] "There shall be recorded in the aforesaid Registries. . . . 3 Acts or contracts by virtue whereof immoveables or real rights are adjudicated to a person, even though it be with the obligation to transfer them to another or to invest the amount thereof for specified purposes."

[30] Note 20, *supra*.

EDWARD MCWHINNEY

Judicial Positivism in Australia

The Communist Party Case

I

In a speech delivered late last year, the then Lord Chancellor of the United Kingdom, Viscount Jowitt, took the opportunity of restating, in unusually emphatic form, the positivist conception of the nature and scope of the judge's task.

"You know," said the Lord Chancellor, "there was a time when the earth was void and without form, but after these hundreds of years the law of England, the common law, has at any rate got some measure of form in it . . . The problem is not to consider what social and political conditions of to-day require; that is to confuse the task of the lawyer with the task of the legislator. It is quite possible that the law has produced a result which does not accord with the requirements of to-day. If so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is. . . . If this case does come to the House of Lords, if we examine it and discover that there is a case which is precisely in point, then whether we think it accords with modern requirements and conditions or whether we think it does not, we shall follow loyally the decision which has already been come to. In that way and that way only can we introduce some certainty into the law."[1]

One may, of course, have some doubts on the wisdom of pursuing as the ultimate judicial goal any single aim of introducing certainty into the law, especially where the judge concerned is sitting (as the Lord Chancellor is) as a member (and in this case the senior member) of a final appellate tribunal; it may be that on occasion "certainty" could with advantage yield to "modern requirements and conditions" where the two are in conflict. But by and large, of course, Viscount Jowitt has succumbed too easily to what Judge Frank has called the "legal-certainty-myth"—the illusion that law is, or can be made, unwavering, fixed, and settled, and

Edward McWhinney is a member of the New South Wales Bar and Visiting Lecturer in Law, Yale University.

[1] Address by Viscount Jowitt to the Seventh Annual Convention of the Law Council of Australia, quoted (1951) 25 A.L.J. 296.

which Judge Frank has likened to the infant's craving for the infallible authority of its father.[2] For it is precisely in deciding "what the law is" and whether or not a case actually is "precisely in point" that subjective considerations operate so strongly on the judicial choice and the way is opened for the entry of the "inarticulate major premise." In this regard, the House of Lords has developed to such a very fine art the habit of "distinguishing" (as distinct from overruling) unwanted precedents as to make the rule of the binding force of precedents as laid down in the *London Tramways Case*,[3] substantially inoperative in practice. The essential weakness of the pure positivist position in this respect, of course, is in its failure to recognize that it is not a choice between judicial policy-making and absence of judicial policy-making; but between policy-making that is based on a full canvassing of the alternative lines of action available and policy-making in the dark. Nor can the Lord Chancellor's advice to "put it right by legislation" be accorded any undue weight at the present day. The history of the attempts by the British Parliament to bring the Common Law into line with "social and political conditions of to-day" is one of tenacious judicial opposition and time-consuming delays before Parliament could offset by further legislation the worst rigors of harsh judicial interpretation of the original statutory corrections of the Common Law[4]. It is unreasonable, to say the least, to expect the British Parliament today, weighted down as it is by the pressures of ordinary business of the complex-economically-organized society[5] that is present-day Britain, to assume the additional function of surveillance of the Common Law so as to make it "accord with the requirements of to-day." Viscount Jowitt, whose term as Lord Chancellor began with his appointment by the postwar Labor Government and ended with its defeat, should at least be aware of that.

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[2] Frank, Law and the Modern Mind (1930) at p. 20.

[3] London Street Tramways Company v. London County Council [1898] A.C. 375.

[4] Thus, to take the politically innocuous example of the Married Women's Property legislation, it was held in Re Harkness and Allsopp's Contract, [1896] 2 Ch.D. 358, that though the Act of 1882 gave a married woman power to dispose as a feme sole of real estate, being separate property, of which she was legal owner, this did not apply to enable her to alienate lands of which she was active trustee, without the consent of her spouse; it took eleven years before the result of this judicial construction could be remedied by the Act of 1907. In the same way, the Act of 1907, stating that a husband *need* not be joined in an action of tort against the wife was held by the House of Lords to be merely permissive, so that though a husband was not liable for his wife's contracts, he could still be liable for her torts (Edwards v. Porter [1925] A.C.1), a situation that was not finally corrected until the further legislation could be passed of 1935.

[5] The term as used in Simpson and Stone, Law and Society (1950).

II

Significant as is the part played by the judges in relation to statute law in a country like the United Kingdom which has no written Constitution and whose legislature is recognized to be omnipotent, it obviously still differs *toto coelo* from that of judges who are exercising judicial review under a written and rigid federal constitution, involving a division of powers between a central government and member States—as for example is the case with the United States and several of the countries of the Commonwealth.

To the outside observer, a most striking feature of the constitutional jurisprudence of the United States Supreme Court at the present day must be the frank recourse by the varied personnel of the Court to policy considerations in arriving at their conclusions. It might, perhaps, have been expected that in those of the Commonwealth Countries (e.g. Canada and Australia) whose constitutional systems are patterned to a substantial extent on that of the United States, the judges in the highest appellate tribunals at least might have come around to a similar approach to that now followed by the United States Supreme Court with the direct and open canvassing of the merits of the alternative lines of action in any decision. Yet this has not proved to be the case. The Canadian Constitution, as interpreted by the Privy Council and by the Canadian Supreme Court, has been treated as an ordinary statute as distinct from a Constitution, and to be construed according to the ordinary (restrictive) canons of statutory construction.[6] The Australian Constitution, likewise, notwithstanding some early judicial disposition to invoke the American doctrine of the immunity of instrumentalities[7] has been ruled to be a British statute and to be interpreted as such, without regard to American constitutional experience.[8] Not merely is there no recognition of the essentially creative, legislative role, of a judge exercising the power of judicial review of a written constitutional instrument, but we even find judges like Mr. Justice Dixon of the High Court of Australia, who has, indeed, only recently been promoted as Chief Justice in succession to Sir John Latham, laying down their own philosophies of action in terms as baldly positivist as Lord Jowitt's conception of his own office. Sir Owen Dixon, indeed, is not without some acquaintance with the United States Supreme

[6] See McWhinney, "The role of the Privy Council in Judicial Review of the Canadian Constitution," (1952) 5 Vanderbilt Law Rev. 746, for an examination of the judicial approach to the Canadian Constitution, and some of its more surprising consequences.

[7] See, for example, D'Emden v. Pedder (1904) 1 C.L.R. 91, applying McCulloch v. Maryland (1819) 4 Wheat. 316 and Collector v. Day (1870) 11 Wall. 113.

[8] Amalgamated Society of Engineers v. Adelaide Steamship Company (the Engineers' Case) (1920) 28 C.L.R. 129.

Court's work, having spent the wartime years in Washington as ambassador to the United States while on leave from the Australian High Court bench. Yet he made the ceremony at which he was sworn in as Chief Justice, following on his recent promotion to that office, the occasion for a stern rebuke to those who had criticized the High Court of Australia as being excessively "legalistic." As the Chief Justice asserted:

"It is not sufficiently recognised that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure. Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[9]

Just what a "strict and complete legalism" means to Sir Owen Dixon is amply indicated by the approach of the High Court of Australia several years back to the question of the constitutionality of the legislation of the then Labor Government of Australia nationalizing the private trading banks. The High Court chose to ignore altogether the extensive economic material submitted in their briefs by the respective parties to the case, and in a decision[10] running into many hundreds of pages purported to derive the ratio of its decision from the decided cases alone, unilluminated by any such evidence, although as the Privy Council was shortly to admit, when the case went up to it on appeal,[11] in constitutional cases of that nature "the problem to be solved will often be not so much legal as political, social, or economic."[12] The special character of the High Court's decision in the *Bank Nationalization Case*[13] is indicated by the fact that the nub of the decision was that the federal legislation there in question violated the guarantee contained in the first paragraph of S. 92 of the Australian Constitution that:

"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

[9] Reported in (1952) 26 A.L.J. 2, at p. 4.

[10] Bank of New South Wales v. Commonwealth (1948) 76 C.L.R. 1.

[11] Commonwealth v. Bank of New South Wales (1949) 79 C.L.R. 497 (Privy Council).

[12] *Ibid.* 639.

[13] See generally Stone, "A Government of Laws and yet of Men, The Australian Commerce Power," (1950) 25 N.Y.U.L.R. 451.

Now it seems clear from an examination of the intentions of the drafters of the Constitution that this section was designed simply to eliminate the problem of border tariffs which had so plagued the six prefederation Australian colonies—the "barbarism of borderism" as it has been called;[14] a conclusion which a reading of the second paragraph of S. 92[15] and also a reading of S. 92 in its context in the Constitution[16] would appear to confirm. The elaborate superstructure of propositions which successive judges of the High Court of Australia have over the years built upon S. 92 of the Constitution with the effect of turning it into a protective umbrella shielding commerce and business generally from federal and state governmental regulation, though it may be able to be justified on broad policy grounds, can clearly, therefore, in no way be brought within the compass of a "strict and complete legalism" on the part of the judges. It is perhaps characteristic that the judges of the High Court of Australia should, in the spirit of Herbert Spencer's social statics, have converted S. 92 of the Australian Constitution into an "Australian Due Process Clause" while at the same time refusing to admit that social and economic considerations have any place in constitutional law adjudication.

III

The curiously unsophisticated attitude towards social and economic evidence that the judges of the High Court of Australia showed in the *Bank Nationalization Case*, is paralleled by the judges' handling of questions of fact in the recent litigation[17] resulting from the Communist Party Dissolution Act.[18] The statute in question was introduced by the present

[14] See generally Beasley, "S. 92, Its History in the Federal Conventions," (1948) 1 U. of W.A. L.R. 97 *et seq.*

[15] "But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

[16] Thus the whole of Ch. IV of the Constitution (Ss. 81–105), and especially Ss. 86 to 95, appear to manifest a transitory purpose.

[17] Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1. This case may be compared with Dennis v. United States ((1951) 341 U.S. 494), in which the Supreme Court of the United States sustained the conviction of the eleven Communist Party leaders for violation of the Smith Act. The principal constitutional issue raised in the Dennis Case was whether the Smith Act either inherently or else as construed and applied in the instant case violated the First Amendment; this gave the Supreme Court the opportunity also of re-examining the "clear and present danger" test as laid down by Holmes J. in Schenck v. United States ((1919) 249 U.S. 47), and subsequently developed in Gitlow v. New York ((1925) 268 U.S. 652) and later cases.

[18] Communist Party Dissolution Act, No. 16 of 1950.

Conservative coalition government with the stated aim of dissolving the Australian Communist Party and also of preventing communists and persons of communist affiliation from holding office in trade unions and from being employed in government service.[19] In view of the absence of any specific bill of rights under the Australian Constitution,[20] the question of a possible infringement of civil liberties as such could not be directly canvassed as a legal issue in the case. Such civil rights arguments as did come up in the case in fact could only arise interstitially and had to be subsumed under some more general non-civil rights sections of the Constitution, in this case that section of the Constitution investing the federal government with legislative power concerning the "naval and military defence of the Commonwealth."[21]

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[19] For a discussion of the details of the Act and also a survey of the political events preceding its passage by the Australian Parliament, see Beasley, "Australia's Communist Party Dissolution Act," (1951) 29 Can. Bar Rev. 490; see also Note, "Constitutional Law, Constitutions of Other Countries, Act dissolving Australian Communist Party held Unconstitutional," (1951) 65 Harvard L.R. 343.

[20] Note, however, S. 116 of the Constitution, "The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth"; S. 117, "A subject . . . resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject . . . resident in such other State." And S. 80, "The trial on indictment of any offence against any law of the Commonwealth shall be by jury." These sections have, however, only rarely been invoked in constitutional litigation. S. 80, indeed, has been rendered virtually inoperative by the High Court's interpretation of the section as requiring trial by jury only if Parliament prescribes a trial procedure which is, or which Parliament chooses to call, an 'indictment',—R. v. Archdale, (1928), 41 C.L.R. 128; R. v. Federal Court of Bankruptcy, ex p. Lowenstein, (1938), 59 C.L.R. 555. Parliament is thus able to evade S. 80 by prescribing some other procedure, such as summary prosecution.

The Commonwealth's power of acquisition of property under S. 51 (xxxi) from any State or any person for any purpose in respect of which Parliament has power to make laws, is subject to the limitation that the acquisition must be "on just terms." All six judges of the High Court sitting in the Bank Nationalisation Case (1948) 76 C.L.R. 1, were agreed that the Commonwealth Act there in question violated the "just terms" requirement annexed to S. 51 (xxxi), the judges' unanimity on this point being quite striking in view of their conflict as to the other points raised in the legal argument. It has been held that even legislation under the defense power of the Constitution, when it involves the acquisition of property, is subject to the limitations imposed by S. 51 (xxxi); so that the Commonwealth must pay "just terms" even for property taken for defense purposes,—Johnson, Fear, and Kingham and the Offset Printing Company v. The Commonwealth (1943) 67 C.L.R. 314. And, of course, note also the operation of S. 92 of the Constitution, under the extended interpretation given to it by the High Court.

[21] S. 51 (vi). In particular it will be noted that apart from S. 116 (supra), there is nothing in the Australian Constitution corresponding to the First Amendment of the United States Constitution. Specifically, there is no guarantee of any kind in the Australian Constitution against laws "abridging the freedom of speech, or of the press," such as is found in the First Amendment of the United States Constitution.

From the federal government's viewpoint, the problem, in order to establish the relationship of the challenged legislation to its defence power, was to get the Court to take notice of such facts as might give the defence power an expanded ambit—in general, the "cold war" in Europe and Asia and more particularly the activities of the Communist Party in Australia. The submission of evidence directly in the brief, in the form of affidavits and other statements, had apparently been abandoned as an effective means of persuading the Court to take judicial notice of facts, after the very scant treatment accorded to such evidence in the *Bank Nationalization Case* by both the High Court and the Privy Council.

In drafting the Communist Party Dissolution Act, the federal government relied first of all on the use of legislative recitals as averments of fact, the Statute[22] making use of a series of recitals, containing the following allegations of fact:

(1) That the Australian Communist Party, in accordance with the basic theory of Communism as expounded by Marx and Lenin, engaged in activities designed to assist or accelerate the coming of a revolutionary situation in which, acting as a revolutionary minority it would be able to seize power and establish a dictatorship of the proletariat;

(2) That it engaged in activities or operations designed to overthrow or to dislocate the established system of government and to procure the attainment of economic, industrial or political ends by force, violence, intimidation, or fraudulent practices;

(3) That it was an integral part of the world Communist revolutionary movement, which engaged in espionage and sabotage and activities of a treasonable or subversive nature;

(4) That certain industries were vital to the security and defence of Australia (including coal-mining, iron and steel, engineering, building, transport, and power;

(5) That the activities or operations of the Communist Party were designed to cause by means of strikes, stoppages of work, and had by these means caused dislocation, disruption, or retardation of production or work in those industries.

In a preliminary hearing Mr. Justice Dixon referred to the Full Court of the High Court two questions for consideration: (a) Does the decision of the validity or invalidity of the provisions of the Communist Party Dissolution Act depend upon a judicial determination or ascertainment of the facts or any of them stated in the recitals of the preamble of that Act and denied by the plaintiffs (the Australian Communist Party and Others)?; and (b) Are the plaintiffs entitled to adduce evidence in sup-

[22] Communist Party Dissolution Act, No. 16 of 1950.

port of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?

At the hearing by the Full Court of the High Court,[23] five of the six majority justices (Dixon, McTiernan, Williams, Fullagar, and Kitto) of the High Court, answered both questions in the negative. These judges were all agreed that the recitals in the Act did not assist the Court. How, then, was the Court to become apprised of facts which might give the defence power an expanded ambit? Such matters, in Mr. Justice Fullagar's opinion, were matters for judicial notice or they were nothing.[24] For his own part, Mr. Justice Dixon thought that members of the Court might "rely on a knowledge of the general nature and development of the accepted tenets or doctrines of Communism as a political philosophy, ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And, with respect to our own country, matters of common knowledge and experience are open to us. But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics."[25]

Mr. Justice McTiernan thought that the Court might take judicial notice of the fact that Communists of the Lenin-Marx school manifest strong sympathy with the Soviet and sharp antagonism to the existing social and political orders and are desirous of overthrowing them;[26] while Mr. Justice Kitto was prepared to take judicial notice of the fact that in October, 1950, international tension had reached a point of real danger to Australia and that the possibility of a war breaking out in the near future was by no means to be overlooked,[27]—but even so, he thought, that was not enough.

As to the recitals in the Act, then, these five majority Justices, (Dixon, McTiernan, Williams, Fullagar, and Kitto, JJ.) as we have said, were agreed that these did not assist the Court. Prima facie, no opinion of the Parliament as to the actual existence or occurrence of some matter or event which would provide a specific relation of the subject of a law with power, could suffice to give that relation,[28] (per Dixon J.). In a period of grave emergency, perhaps the opinion of Parliament would be sufficient,

[23] Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1.
[24] *Ibid.* 267.
[25] *Ibid.*, 196.
[26] *Ibid.*, 210.
[27] *Ibid.* 277.
[28] *Ibid.* 200.

but not in time of peace, or when there was no immediate or present danger of war,[29] (per McTiernan J.). Mr. Justice Williams, indeed, thought that where the constitutional validity of an Act was in issue, the recitals could not be more than a statement of the reasons why Parliament enacted the law—they indicated to the Court what Parliament believed to be the constitutional basis of the Act.[30]

These five majority Justices (Dixon, McTiernan, Williams, Fullagar, and Kitto, JJ.) thus restricted the range of facts to which the Court might have recourse in determining whether the ambit of the defence power could be extended to include the present Act, to those facts of which the Court was able to take judicial notice. And beyond the limited categories of facts enumerated supra, no further enlightenment was provided as to the facts of which the Court did take judicial notice in the instant case.

Three of the majority judges (Dixon, McTiernan, and Williams, JJ.) in fact proceeded to arrive at their decision by applying, in effect, a "pith and substance" test.[31] In substance, the present Act was one relating to property and civil rights and not to defence, and since property and civil rights were matters outside the powers of the Commonwealth under the Constitution, the Act was therefore unconstitutional. That was not to say, however, that such legislation could not be valid in the future; in time of war or grave emergency, an Act having the nature and effects of the present Act could nevertheless be upheld as valid legislation under the defence power.[32]

In this view, the decision on which side of the property-and-civil-rights defence dichotomy a particular piece of legislation will fall is thus essentially a question turning on the state of contemporary international and national affairs, essentially a factual question. One might say, as the Privy Council did in the *Bank Nationalization Case*, that the answer will be not so much legal as political, social, and economic.[33] But the ultimate decision that the High Court here gave, as with the decision that the Privy Council itself gave in the *Bank Nationalization Case*, proceeds on a purely verbal basis.

Somewhat curiously, two of the majority Justices, (Fullagar and Kitto, JJ.), seem to have rested their decision on the ground that the

[29] *Ibid.* 206–7.

[30] *Ibid.* 224.

[31] See especially per Dixon J., *ibid.* 200; per McTiernan J., *ibid.* 206–7; per Williams J., *ibid*, 226–7.

[32] See especially per Dixon J., *ibid.* 202; per McTiernan J., *ibid.* 206; per Williams J., *ibid.* 227.

[33] (1949) 79 C.L.R. 497, 639.

Commonwealth had not affirmatively proved the relationship of the challenged Act to a specific head of legislative power. Since Mr. Justice Fullagar, in particular, at once rejected any notion of a presumption of validity for the Commonwealth Act,[34] and at the same time excluded any question of validity depending on evidence,[35] the task of a national government forced affirmatively to justify legislation, must remain rather baffling. Mr. Justice Williams in part recognized this particular difficulty by, in effect, conceding the necessity "during hostilities" of according the widest possible latitude of discretion to Parliament and the Executive—in that period the Court should uphold the legislation if "the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence."[36] This may, of course, be sound public policy, but such a judicial attitude can hardly be reconciled with that "strict and complete legalism" which Sir Owen Dixon has laid down as the sole function of the High Court.

Rather different to his colleagues' views was the approach of the sixth member of the group of majority justices. Mr. Justice Webb, (like Dixon, McTiernan, and Williams, JJ.) seems to have regarded the problem as one of choosing between defence and civil liberties in classifying the Act for purposes of the exertion of legislative power.[37] Like Mr. Justice Williams, Mr. Justice Webb also saw the difficulties of the Court in attempting to revise the judgment of Parliament which, in his view, probably would be made, and properly so, on materials not admissible in evidence, a task for which a court was not in any case qualified.[38] However, he thought that the onus of proving that the Act was within power was upon those affirming its validity, and that the burden of proof of constitutionality could not be shifted by resorting to recitals: by putting the evidence and argument in recitals instead of to the courts. It was for the

[34] (1951) 83 C.L.R. 1, 262.
[35] *Ibid.* 256.
[36] *Ibid.* 223.
[37] *Ibid.* 240.
[38] *Ibid.* 243. Compare Jackson J. in Dennis v. United States (1951) 341 U.S. 494 570:

"If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing Government will deteriorate. And we would have to speculate as to whether an approaching Communist coup would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophesy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more."

courts to examine and determine the question of constitutionality when that was challenged, and for those who affirmed constitutionality to "prove it in the ordinary way."[39] Mr. Justice Webb was not prepared to hold that the statements in the recitals involving the Australian Communist Party were notoriously true and judicially noticed, though the High Court could pay regard to a public situation of emergency, so far as it was judicially noticed, and its effect on the contents of the defence power.[40]

In the end result, Mr. Justice Webb felt that the decision of the question of the validity or invalidity of the Act depended on a judicial determination or ascertainment of the facts without any limitation by the recitals. He had no doubt that the plaintiffs (the Australian Communist Party and Others) would be entitled to adduce evidence to establish that the banning of the Communist Party was outside the legislative power of the Commonwealth;[41] but in any case, in the absence of evidence by the Commonwealth in support of the Act, the Act was invalid.[42]

Mr. Justice Webb thus seems to envisage the formal submission to the Court and the examination by it of some such type of evidence as the Court chose to ignore in the *Bank Nationalization Case*. The way thus

[39] *Ibid.* 244. Contrast with this Jackson J.'s solution of the judicial "fact-finding" problem, in Dennis v. United States (1951) 341 U.S. 494 567–570, by simply refusing to apply the "clear and present danger" test to the instant case:

"The 'clear and present danger' test was an innovation by Mr. Justice Holmes in the Schenck case, reiterated and refined by him and Mr. Justice Brandeis in later cases, all arising before the era of World War II revealed the subtlety and efficacy of modernised revolutionary techniques used by totalitarian parties. . . . [The test's] recent expansion has extended, in particular to Communists, unprecedented immunities. Unless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organised, nation-wide conspiracy, such as I have described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason. I think reason is lacking for applying that test to this case. . . . The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organisation and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late."

[40] (1951) 83 C.L.R. 1, 244.

[41] *Ibid.* 248.

[42] *Ibid.* 248. Compare Douglas J., dissenting, in Dennis v. United States (1951) 341 U.S. 494, 589–590:

"The political impotence of the Communists in this country does not of course, dispose of the problem. Their numbers, their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places—these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. . . . This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. . . . On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims."

seems opened by Mr. Justice Webb for the introduction of the Brandeis Brief into Australian constitutional jurisprudence.[43] By contrast to Mr. Justice Webb's approach, the basic contradiction in the approach of the other majority justices to solution of the instant case lies in the fact that, while those judges refuse to apply to legislation passed by the Commonwealth Government any presumption of constitutionality of the type in effect applied by the United States Supreme Court to Congressional statutes, since the Court Revolution of 1937 at least,[44] and as Chief Justice

[43] As first employed by Brandeis, as counsel, in Muller v. Oregon (1908), 208 U.S. 412.

It must be noted, however, that even the employment of the Brandeis Brief is not without its hazards. Thus Freund, "On Understanding the Supreme Court," (1949), 82 *et seq.*, has noted that there is a risk, from the governmental viewpoint in following the Brandeis Brief technique and offering detailed statistical and technical evidence to the court, that the Court may be unconsciously tempted to decide the case as if the burden of sustaining the statute were upon the proponent of the statute, that is, without the benefit of any presumption of constitutionality for the statute. The dilemma of the Australian Government which, unlike the United States Government, has never had the benefit in respect to its legislation of any presumption of constitutionality by the Court, is therefore proportionately increased.

[44] The operation of the presumption of constitutionality in the United States has however been somewhat obscured in recent years by the tendency to assume that the guarantee of freedom of speech contained in the First Amendment, and by incorporation in the Fourteenth Amendment, occupies a "preferred position" in the Constitution. The notion of the "preferred position" of the free speech guarantee seems to have stemmed from dicta by Stone J. in U.S. v. Carolene Products, (1938) 304 U.S. 144, 152 n. 4, and it is manifested in cases raising free speech considerations, by a refusal on the part of the Court to show that deference to the legislative judgment that it now normally accords to Congress, in applying the presumption of constitutionality to its statutes.

The notion of the "preferred position" of the First Amendment was attacked by Frankfurter J. in Kovacs v. Cooper (1949) 336 U.S. 77, and again in the Dennis Case (1951) 341 U.S. 494, at 526, as having been put forward in the first place in the Carolene Products Case "with the casualness of a foot-note." As Frankfurter J. goes on to add, in the Dennis Case, (*ibid.* 540):

"On occasion we have strained to interpret legislation in order to limit its effects on interests protected by the First Amendment. . . . But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. In the cases in which the opinions go farthest towards indicating a total rejection of respect for legislative determinations, the interests between which choice was actually made were such that decision might well have been expressed in the familiar terms of want of reason in the legislative judgment."

Semble, too, Jackson J., in dispensing with the "clear and present danger" test so far as his decision in the Dennis Case is concerned (*supra*, foot-note 39), is prepared on this occasion at least to apply virtually an absolute presumption of validity to the Congressional legislation in question, despite the First Amendment.

For a reiteration of the "preferred position" of the First Amendment, however, see Black J.'s dissent in the Dennis Case (*ibid.* 580–581):

"I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. . . . So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness'. Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."

Latham the lone dissentient in the present case was apparently prepared to do,[45] they refuse also to admit or consider evidence that might serve to establish a relationship between the Commonwealth legislation and the heads of Commonwealth power in pursuance of which that legislation purports to have been enacted. For although (as Mr. Justice Fullagar himself admitted in his judgment)[46] in two constitutional cases in the past[47] the High Court did in fact admit evidence as to economic facts, it will now "normally" confine itself solely to matters of which judicial notice can be taken.[48] Yet for the question—what are those matters of which the Court can take judicial notice?—the standard formula is Dixon J.'s prescription in *Stenhouse* v. *Coleman*[49]: "Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the Court must depend upon matters of general

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[45] Chief Justice Latham, in spite of a long career as a Conservative political leader prior to his appointment as Chief Justice, showed during his term as Chief Justice, in marked contrast to his brother justices, a strong tendency to broad or beneficial construction of the federal government's legislative powers.

Thus, during the recent War, in passing upon the Uniform Taxation laws of the war-time Labor Government of the Commonwealth, he upheld the power of the Commonwealth to withdraw the field of income taxation entirely from the States, basing the legislative competence of the Commonwealth upon its general powers, as well as upon the war-time defence power as his brother justices preferred to do, with the important consequence that in Latham's view the Uniform Tax Laws would be valid even when continued into peace-time, (South Australia v. Commonwealth (1942) 65 C.L.R. 373). And again in the Bank Nationalisation case, although with the rest of the Court Latham found the Labor Government's legislation to be invalid, he rested his decision upon the nature of the compensation afforded under the legislation to the shareholders in the private trading banks, being quite prepared to hold the key provisions to be within the Commonwealth's legislative powers. The importance of Latham's ground of decision lies in the fact that he did not oppose any absolute bar to nationalisation, as the constitutional requirements for compensation annexed to the government's power of eminent domain (S. 51. (xxxi) of the Constitution) require the provision of "just terms", a problem that could be met ultimately by redrafting any nationalisation legislation rejected on this ground (Bank of New South Wales v. Commonwealth, (1948) 76 C.L.R. 1).

In the Communist Party Case, Chief Justice Latham seems finally to have arrived at a presumption of constitutionality in favor of the Commonwealth. As his dissenting judgment notes, (Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 154):

"... It is not for a court (either at the present stage of these cases, or at any later stage) to ask or to answer the question whether or not it agrees with the view of Parliament that the Australian Communist Party and organisations and persons associated with it are enemies of the country. It is for the Government and Parliament to determine that question, and they have already determined it. Whether they are right or wrong is a political matter upon which the electors, and not any court, can pass judgment. The only question for a court, therefore, is whether the provisions of the Act have a real connection with the activities and possibilities which Parliament has said in its opinion do exist and do create a danger to Australia."

[46] 83 C.L.R. 1, 256.

[47] Jenkins v. Commonwealth (1947) 74 C.L.R. 400; Sloan v. Pollard (1947) 75 C.L.R. 445.

[48] See per Fullagar J., 83 C.L.R. 1, 256.

[49] (1944) 69 C.L.R., at p. 469.

public knowledge." In fact, (as indeed, the curiously assorted range of matters of which the High Court did take judicial notice in the instant case, indicates), this is a circular definition that will allow the Court to take notice of whatever it so desires.

IV

As we have already noted, while the ideal of a "strict and complete legalism," as sponsored so enthusiastically by Mr. Justice Dixon, could result in the High Court's refusing, as it did in the *Bank Nationalization Case*, to weigh expert economic evidence submitted by both sides as to the pros and cons of central banking in the semi-planned economy of present-day Australia, this did not prevent the judges in their end-decision from giving a pure laissez-faire interpretation to that "freedom" of trade, commerce, and intercourse among the States supposedly guaranteed by S. 92 of the Australian Constitution. As a result of the High Court's exclusion of expert evidence in the *Bank Nationalization Case*, the range of economic facts available to the judges was no broader than their own background and experience. It is trite to observe that on the present specialist basis of training and recruitment of members of the judiciary in the United Kingdom and in the Commonwealth Countries, judicial expertise does not extend today to an acquaintance with Keynesian economics. But while, according to the doctrines of the classical economists, nationalization of the trading banks might seem to impair "freedom" of trade, commerce, and intercourse among the States, the Keynesian economist might well claim that that extension of governmental control over credit and investment that is necessarily bound up in any such nationalization legislation, would, by promoting stability in the national economy, augment rather than impair the scope of the "freedom" that has been held to be guaranteed by S. 92. The point is that whichever premise (the Classical-economics premise or the Keynesian-economics premise) is adopted by the decision-maker, automatically determines the result of the case.

The Privy Council indeed seems to have partly conceded this fact, for, after making the observation that in constitutional cases the issue to be solved will often be not so much legal as political, social, or economic, its judgment in the *Bank Nationalization Case* goes on to record[50]: "Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and

[50] Commonwealth v. Bank of New South Wales (1949) 79 C.L.R. 497, 639 (Privy Council).

reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free." Though this was not in fact the basis on which the Privy Council itself ultimately proceeded in arriving at its decision in the *Bank Nationalization Case*, it is clear that it might have done so and still arrived at the same end result. But the decision would then have been based upon a full and frank consideration of the policy alternatives against a background of the available economic evidence.

Of the judges of the High Court of Australia, only Chief Justice Latham appears to have grasped the full implications of the Privy Council dicta in the *Bank Nationalization Case* as to the relevance of political, social, and economic questions in constitutional decisions; though the Chief Justice seems rather to have overshot the mark by concluding without more that these dicta sought to authorize a sort of general "*Freirechtslehre*," instead of being directed as, it is submitted, the Privy Council opinion clearly indicates, to the determination of the factual question whether or not the "freedom" supposedly guaranteed by S. 92 of the Constitution is infringed or not.

"I am aware", said the Chief Justice, "that it is sometimes said that legal questions before the High Court should be determined upon sociological grounds —political, economic, or social. . . . But such a proposition as, for example, that the recent Banking case should have been determined upon political grounds and that the Court was wrong in adopting an attitude of detachment from all political considerations appears to me merely to ask the Court to vote again upon an issue upon which electors and Parliament had already voted or could be asked to vote, and to determine whether the nationalisation of banks would be a good thing or a bad thing for the community. In my opinion the Court has no concern whatever with any such question".[51]

Nevertheless, in rejecting, in the *Communist Party Case*, the idea that the Court should permit the parties to adduce evidence as to political, social, or economic facts, Chief Justice Latham also rejected the suggestion that the doctrine of judicial notice was an adequate substitute means whereby the Court might become apprised of facts: "The limitation of the principle of judicial notice to facts which are notorious—which are so clear that no evidence is required to establish them—appears to me to prevent a court from ever reaching a conclusion based only upon such facts with respect to an issue of actual or potential public danger calling for the exercise of the legislative powers now under consideration."[52] The

[51] Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 148–9.
[52] *Ibid.* 163.

way out of the impasse for Chief Justice Latham was, in effect, for the Court to apply a presumption of constitutionality.[53] By contrast, Mr. Justice Webb, (as we have mentioned earlier), seems to have envisaged the formal submission of evidence to the Court by the parties to the case and the examination of that evidence by the Court. The remaining judges in the *Communist Party Case*, however, seem not to have been aware that a fact-finding problem existed, and to have rested on the judicial notice doctrine with all the risks necessarily attendant thereto that the decision will turn on an inarticulate major premise.

Something very like this, indeed, seems to have taken place with the judgments of the majority justices (apart from Webb J.) in the *Communist Party Case*. Thus we find Mr. Justice Dixon declaring in the course of his judgment: "(The Constitution) is an instrument framed in accordance with many traditional conceptions. . . . Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or persons to be affected and affords no *objective test* of the applicability of the power, that it is law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth."[54] And again in the same portion of his opinion Mr. Justice Dixon refers to the "legislature's characterization of the persons and bodies adversely affected, and no factual tests of liability."[55]

Mr. Justice Dixon's reference to the rule of law is of course an invocation of that principle which Professor Dicey, writing at the end of the 19th century, thought to be a basic characteristic distinguishing English Constitutional Law from that of the countries of Continental Europe. "We mean . . . that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or dis-

[53] *Supra* note 45.

[54] (1951) 83 C.L.R. 1, 193.

[55] *Ibid.* It is trite to observe at this stage that, though (as mentioned, *supra*) the Australian Constitution contains no Bill of Rights and in particular no constitutional guarantee of any kind against laws "abridging the freedom of speech, or of the press," the High Court decision in the Australian Communist Party Case in its end result appears to accord greater deference to such a principle than does the United States Supreme Court decision in the Dennis Case, this notwithstanding the presence in the United States Constitution of the express guarantee of the First Amendment.

cretionary powers of constraint."[56] In fact, running through the opinions of the majority justices of the High Court in the *Communist Party Case* is the notion that the Communist Party Dissolution Act, insofar as, in its provisions, it operates to attach obligations or incapacities on individuals independently of any objective standards of responsibility or liability, runs counter to fundamental principles inherent in the Common Law. It is clear that Mr. Justice Dixon, in thus specifically embracing the rule of law concept, and also, in common with his brother justices, in reacting against the absence in the contested legislation of any objective standards of responsibility and liability, is entering upon a policy interpretation, the policy here being the preservation so far as possible of the traditional Common-Law conception of individual liberties.[57] Since there is no bill of rights as such under the Australian Constitution, these traditional liberties, if they are to be protected by the judges must perforce be protected through the devices of statutory interpretation. There are already, in the High Court's constitutional jurisprudence, sufficient indications of a pattern of harsh judicial construction of statutes derogating from civil liberties,[58] as to make this latest venture by Mr. Justice Dixon and his colleagues not so novel in itself,[59] though we have certainly come

[56] Dicey, Introduction to the Study of the Law of the Constitution, (9th Ed., 1939) 188.

[57] This emphasis on individual liberties would seem to owe much to the continued user in legal education in the Commonwealth Countries of Professor Dicey's masterly expositions. For a grudging tribute to Professor Dicey's work as "an evangel accepted reverently and without criticism or question in our schools," see the Introduction by Chief Justice Kennedy of the Irish Free State to Kohn, The Constitution of the Irish Free State (1932) at p. xii. See also Pollak, "The Legislative Competence of the Union Parliament," (1931) 48 S.A.L.J. 269, 286.

[58] See, for example, R.v. Wilson, *ex p.* Kisch (1934) 52 C.L.R. 234, where the issue involved was the exercise of the Commonwealth's powers to control immigration and entry of aliens into Australia; in the Kisch case, the ingenious administrative device of a literacy test in the form of a dictation test in a "European language" (as specified by the Immigration laws), was held to be ineffective where the "language" employed for the test was the almost extinct Scottish-Gaelic, which, the High Court ruled, was not a "European language." Again in O'Keefe v. Calwell (1948) 77 C.L.R. 261, deportation proceedings against an Indonesian woman who had come to Australia as a war-time refugee and who had obtained British citizenship by marriage immediately prior to the deportation proceedings against her, were quashed by the High Court on a very strict reading of the Commonwealth Immigration Act.

It will be noted that both these cases concerned the application of the Commonwealth's Immigration Laws, a vexed question at any time but frequently suffering from the additional handicap of inept administration.

[59] In one sense, the High Court decisions in the Bank Nationalisation case and in the Communist Party case are both applications of the philosophical ideas of the English Liberal school with the dual theme of economic laissez-faire on the one hand and the extension of political freedoms on the other. This is in many respects parallel to the pattern of judicial interpretation prevailing in the United States from the period after the Civil War down to 1937, so far as the maintenance of economic laissez-faire is concerned; it might be argued, however, that the United States Supreme Court majorities prior to 1937 lacked that bias in favor of political freedoms which now seems manifested by the High Court of Australia.

a long way from Mr. Justice Dixon's ideal of a "strict and complete legalism."

It is submitted, however, that the further objective stated by Mr. Justice Dixon—"to maintain the confidence of all parties in Federal conflicts"—would better be attained by the High Court's abandoning altogether the purely mechanical conception of the judicial office, the fiction that judges never make law but simply apply it, and recognizing frankly the essentially creative role of a Supreme Court exercising judicial review under a written and rigid Constitution. That this would necessitate some far-reaching changes in the Court's techniques of inquiry and indeed in its whole approach to the task of adjudication in constitutional cases, is clear. Informed policy-making is dependent ultimately on acquaintance with all the facts. It would seem, as the starting point, that the High Court must be prepared to admit, and when admitted to weigh, evidence of the type that the United States Supreme Court has become familiar with since the Brandeis Brief was first employed. What would happen then must depend finally upon the judges themselves. Though it seems clear, here, that the prevailing methods of legal education in the United Kingdom and the Commonwealth Countries, dominated as they are by the fixed traditions of the ancient universities and of the inns of court, fall far short of giving the legal decision-maker that broad training in the social sciences that is so necessary in handling the complex public law issues of present-day society,[60] it would at least represent a marked step forward to be spared, in the High Court's adjudication of constitutional cases in the future, what Holmes has called a typical natural law manifestation—the lawyer's unawareness that he is taking sides on burning questions.[61]

[60] See McDougal and Lasswell, "Legal Education and Public Policy: Professional Training in the Public Interest," (1943) 53 Yale L.J. 203.

[61] Quoted in Stone, The Province and Function of Law (1946) 251.

Comments

RECENT CONSTITUTIONAL DEVELOPMENTS IN LATIN AMERICA

I

SELF-DETERMINATION: THE NEW PUERTO RICO FORMULA—The first Constitution of Puerto Rico was proclaimed on July 25, 1952. In the English text, the name adopted is "Commonwealth," in the Spanish text "Estado Libre Asociado" (Associated Free State).

Puerto Rico was a Spanish colony until 1898. As a result of Cuba's last war for Independence, Spain had granted autonomy to both Cuba and Puerto Rico in 1897, but it never went into effect due to military occupation by the United States. Pursuant to the Peace Treaty of Paris signed in 1898 (30 Stat. 1754, April 11, 1899), the island of Puerto Rico was ceded to the United States. The Organic Law of April 12, 1900 (Foraker Act, c. 191, 31 Stat. 77) organized the first American civil government; it was amended March 21, 1917 (Jones Act, c. 145, 39 Stat. 951) and August 5, 1947 (c. 490, 61 Stat. 770). Under the first amendment, Puerto Ricans acquired American nationality, and under the second, they were empowered to elect their own Governor, in the same manner as they had been electing their own Legislature.

Public Law No. 600 of July 3, 1950 (c. 446, 64 Stat. 319) authorized the Puerto Ricans to draft a constitution if its inhabitants so decided in a popular plebiscite or referendum. The result of the plebiscite was favorable (387,016 votes for; 119,169 against). The Popular Party which had been in power since 1948 and had had a majority since 1940, espoused the proposal and was joined by the small Statehood and Socialist parties; the Nationalist and Independence parties, both minority parties, came out against it.

The Constitutional Convention called pursuant to the 1950 Act was elected in August, 1951, and ended its work on February 6, 1952. The draft Constitution was adopted by a second popular plebiscite held on March 3, 1952 (374,646 votes in favor; 82,923 against, out of a total registered electorate of 783,491). The Constitution was then submitted to the Congress of the United States, as required by the 1950 law, and approved July 3, 1952 (Public Law 447, ch. 567) subject to exceptions. As a result of opposition, especially to two provisions, section 20 of article II was finally eliminated—this section enumerated a series of theoretical principles, such as the "right to work" which are to be found in many of the recent Latin American constitutions—and section 5 of the same article was clarified to the effect that nonsectarian public school education should not bar education in nongovernmental schools (private religious education). A proviso was further added that any future amendment or revision shall be consistent with the Federal Constitution of the United States, the Puerto Rican Federal Relations Act, defining the relations between the United States and Puerto Rico (the Foraker Act of 1900, as amended in 1917 and 1947),

Public Law No. 600 of 1950 (81st Congress), and the Resolution approving the Constitution.

This Constitution of Puerto Rico, as above stated, was proclaimed July 25, 1952. The amendments imposed by Congress, have been approved as a routine ratification in the election held in November, 1952.

The most interesting aspect of the new Constitution is the exact nature of the new political organism that has been created. Its draftsmen decided to use two different terms in the Spanish and English texts, because they found it impossible to find a Spanish term corresponding to the English "Commonwealth." They have given no explanation of what they intend by "Free Associated State" (*Estado Libre Asociado*), but Resolution No. 22 of the Constitutional Convention explaining the scope of the term "Commonwealth," states:

> "Whereas, the word 'commonwealth' in contemporary English usage means a politically organized community, that is to say, a state (using the word in the generic sense) in which political power resides ultimately in the people, hence a free state, but one which at the same time is linked to a broader political system in a federal or other type of association and therefore does not have an independent and separate existence;
>
> "Whereas, the single word 'commonwealth', as currently used, clearly defines the status of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States, i.e., that of a state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence is a part of its political system in a manner compatible with its federal structure;" . . .

In short, it may be said that Puerto Rico enjoys full internal autonomy to elects its officials and to govern its own life, but is subject to the Federal Government of the United States in all matters relating to international affairs; and on the other hand, it has no power whatsoever to participate in the Federal Government of the Union. It has passed from colonial status to an intermediate status, being neither a state of the Union nor an independent republic. This form is reminiscent of the British Dominions in their earlier phase and of the Commonwealth of the Philippines before it became an independent Republic.

Only the future and the working out in practice of this formula will determine its contours; it is a flexible form which permits diverse evolution.

As to the internal life of Puerto Rico, the Constitution establishes a Government based on the popular will and organized under the traditional three Powers: a Governor elected for a four-year term, assisted by a cabinet of various secretaries; a bicameral Congress, in which minority representation is guaranteed; and a Judicial Power, with an insular Supreme Court of Justice. There is an enumeration at the beginning of the Constitution of the Bill of Rights, similar to that in other modern Latin-American constitutions and not unduly lengthy. The flag, the hymn, and the coat of arms which have been in use up to the present time as general symbols have been declared official by supplementary resolutions of the Legislative Assembly.

The federal relations between Puerto Rico and the United States have

undergone no changes; they are still governed by the Organic Law. Puerto Rico continues as a territory of the United States, not integrated as a state; the inhabitants are American citizens, but have no vote in presidential elections nor do they send senators or representatives to the federal Congress; they are subject to the Army draft. On the other hand, they are exempt from federal taxation and pay only the taxes levied by the Insular Govermnent; there is free trade between Puerto Rico and the continental United States, but the Federal Government reserves the right to fix import quotas on certain insular products (imports of refined sugar at the present time are limited), and the coastwise restrictions on shipping are applicable; the same customs tariff is in force as in the United States, but the proceeds of duties accrue to the Insular Government; and immigration is subject to federal law and authorities (see 48 U. S. C. A., sec. 731 *et seq.*).

The two principal differences between the new Commonwealth and independent republics is that it lacks all international and military power; these fields are vested exclusively in the Federal Government; neither does it have its own national currency. Puerto Rico is represented in Washington by a Resident Commissioner elected every four years; he has a seat in the House of Representatives, but no vote, and participates only in debates involving insular affairs.

The new formula was proposed and defended by the party in power, the Popular Party, whose chief leader is the Governor, Luis Muñoz Marin; he has triumphed in all elections held since 1940. Opposed to the formula are the Independence Party, which advocates full, immediate independence to be achieved by peaceful means, and the Nationalist Party which on more than one occasion has resorted to violence. The Statehood Party, with only slight backing, advocates the admission of Puerto Rico as a new state in the Union.

The dynamic role of this Constitution and especially some aspects passed over in silence in it such as the federal relations with the United States and some possible activity in the international sphere will in the course of time clarify the nature and scope of this new formula of self-determination. Its flexibility may well permit an evolution not unlike that which some years ago took place in the British Dominions.

II

URUGUAY: NEW SYSTEM OF EXECUTIVE POWER VESTED IN A COUNCIL—On March 1, 1952, the first Government Council in America to exercise the full executive functions in council or "collegiate" form took office.

It is the second attempt in Uruguay of this character. Its purpose is to avoid the dictatorial excesses which in many Latin-American countries have ensued from following the presidential formula of the United States.

During the 20th century, Uruguay has been blessed by a peaceful democratic order which is in marked contrast with the constant agitation in many other Latin American countries. In the 19th century, however, it likewise suffered from a succession of civil wars between the two traditional parties,

the liberal "*Colorados*" and the conservative "*Blancos*." In 1911, after his re-election as President, José Batlle Ordoñez proposed amendment of the Constitution to establish a mixed system under which the President of the Republic would share his duties with a National Council in which both major parties would be represented (six seats for the majority party, 3 for the minority). The proposal was inspired by the Federal Executive Council of Switzerland.

The proposed system met at first with strong opposition, but it was finally approved in the 1919 Constitution. It lasted only a short time; President Terra abolished it in 1933, and the new Constitution of 1934 reverted to the traditional presidential system. Soon after his accession to the presidency, after the election of 1951, Martinez Trueba (a disciple of Batlle Ordoñez) again proposed the Executive Council system. Pursuant to the constitutional requirements for amendment, the amendment was passed by a ⅔ majority of the Uruguayan Congress and ratified at a plebiscite at which 232,076 votes were cast in favor, and 197,684 against it. The two leading parties had campaigned officially in favor of the amendment, with some dissident factions in each; the minority parties (fundamentally the Socialist and the Christian Democratic parties) were in the opposition, as also some important factions of the Liberal "Colorado" party. In the capital, Montevideo, the opposition had a majority.

The principal characteristic of the new system is the complete elimination of the office of President of the Republic, and its replacement by a National Government Council composed of 6 members of the majority party and 3 members of the strongest minority party. In this distribution of offices, further, there is a possibility by means of the system of cumulative voting under the electoral laws, for different factions of each party to be represented; each party may present different slates of candidates, the votes being accumulated later.

The representative functions previously exercised by the President of the Republic will hereafter be exercised successively for one year by the councillors of the majority party who have occupied the first posts in the winning slate of candidates. Exception is made in the case of Martinez Trueba himself, who will exercise these representative functions until the expiration of the term of four years for which he was elected prior to the effectiveness of the amendment.

The Council will meet at stated periods and may be called into special session by the President or upon request of any two members. Its duties are exactly those which were previously vested in the President. Auxiliary to it are the various Ministers or Secretaries, who now become mere administrative heads of the various government departments. The *Intendentes* or provincial Governors are in the same manner replaced by departmental collegiate councils.

The first National Governmental Council was organized on March 1, 1952. It is composed of five members of the "Batllista" faction of the liberal "Colorado" party (the former president, Martinez Trueba, being one of these five), one member of the "Blanco Acevedista" faction of that party, and three members of the "Nacional Herrerista" faction of the conservative "Blanco" party.

Time will tell whether this experiment of a council system will become ac-

climatized or not in a small and exemplary country like Uruguay. If it is successful, it may well make new paths for the constitutional law of Latin American countries where the presidential system, so successful in the United States, has merely left the door wide open for personal dictatorships with their suite of revolutions and civil wars.

III

CUBAN CONSTITUTION REPLACED BY A PROVISIONAL STATUTE—On March 10, 1952, a military coup overthrew the Government. It was led by General Batista, ex-President and a candidate for the presidency at the forthcoming elections to be held June 1st. The President Prio Socarrás, after taking asylum in the Mexican Embassy, had to flee the country, and the 1940 Constitution was replaced by a provisional Constitutional Statute, which was promulgated on April 4 by the new *de facto* Government.

In general, the new Constitutional Statute incorporates the provisions of the Consitution it supplanted, although the provisions are somewhat reduced in number.

The principal change consists in the elimination of the Congress, which is replaced by the cabinet or Council of Ministers, and the creation of a Consultory Commission.

The President is appointed by the Council of Ministers, instead of being elected by popular vote; since the President is the one who appoints the Ministers, this provision merely serves to mask a *de facto* situation. The Council of Ministers is vested with all the legislative powers which were, pursuant to the Constitution, inherent in the Congress; the Congress itself in the transitional final provisions being declared dissolved. The members of the Consultory Commission are also appointed by the President of the Republic and "are to be selected from among outstanding representatives of the fundamental activities of national life;" it has no powers of decision, but it is to be heard in all cases specified in article 138 and may make proposals for new legislation to the Council of Ministers.

There are some minor amendments to the provisions relating to the suspension of the Bill of Rights; the new Government had *de facto* already suspended them.

Article 254 calls for general elections to be held on the third Sunday of November, 1953. On this date a reform of the 1940 Constitution will be submitted to a popular referendum. If the reform be rejected, this 1940 Constitution will again be in full force and effect as of the date the newly elected President takes office. Immediate amendments to the Electoral Code are also announced; meanwhile all rights heretofore enjoyed by political organizations are declared extinguished, that is to say, all political parties are dissolved.

The Constitutional Statute itself can be amended by a nominal $\frac{2}{3}$ majority vote of the members of the Council of Ministers, the very body which promulgated it.

Up to the present time, General Batista continues as acting Provisional Presi-

dent, assisted by a Council of Ministers composed of civilians. The leaders of the two majority parties, the Authentic Party which was in power, and the Orthodox Party which seemed about to win in the elections that were to be held, continue strongly opposed to the new *de facto* Government and have refused to collaborate in the new institutions. The Consultory Council was appointed on the basis of personalities selected from all spheres of professional life.

Cuba, therefore, is subject to a *de facto* dictatorship, which has clothed itself in a provisional mantle and which promises to hold elections next year. So far however, it has not assumed the drastic character customary in other Latin-American dictatorships.

JESUS DE GALINDEZ*

THE NEW CONSTITUTION OF POLAND

Poland's constitutional history is one of the most interesting in Europe; usually, the constitutional law institutions of Poland preceded those introduced later on in other continental countries. Generally, it is little known that as early as 1505 the Polish constitution "Nihil Novi" firmly established the parliamentary form of government, developed by custom in the preceding century. At the same time, other European countries, England excepted, entered the path of absolutism.

Poland was also the first country to enact a modern constitution on the continent: its basic law of May 3rd, 1791,[1] was a few months older than the French revolutionary constitution of the same year. It was, however, in force only a short time, as Poland was partitioned by Austria, Prussia, and Russia and recovered her independence only after World War I. A new constitution was enacted in 1921; this was in effect until 1935 when it was replaced by the last prewar Polish constitution.

All these constitutions were the products of Polish political thought, following the country's traditions, adapted to its needs, and taking into account the particular requirements of their times. The same observations do not apply to the new constitution of July 22, 1952,[2] as is quite understandable in view of the present predicament of the country. The new basic law of Poland patterns itself on that of Soviet Russia, lacks originality, and embodies communist principles which to a greater or lesser extent were imposed upon the country even before its enactment. However, it is not a mere copy of the Soviet constitution, although the general plan is similar and, out of 91 articles, 50 contain clauses more or less strictly translated from the basic law of the U.S.S.R. It

* Lecturer, Columbia University.

[1] This date became a Polish national holiday which has been celebrated ever since; it is not recognized, however, by the present regime of the country.

[2] For the Polish text of the constitution, see Konstytucja Polskiej Rzeczypospolitej Ludowej, Biblioteka Nowej Wsi, 7.26.1952. For the English text, see the Draft Constitution of the Polish People's Republic, Polish Embassy in Washington, April 1952; a few completely insignificant changes relating to the phraseology of some articles in the draft have been made in the final text.

falls short of a perfect communist piece of legislation. The explanation of this fact is simple. The Soviet constitution of 1936 was enacted after nearly twenty years of communistic regime, after all the opposition had been exterminated, and most theories of Marx and Lenin could be given full effect. The Polish constitution was drafted only seven years after Moscow set up the communist government in the country. Besides, the centuries-long czarist regime had made the Russians readily submissive to the will of any ruler, whereas the Poles were always attached to their liberties and to western culture.

Therefore, whereas it was possible, in article 2 of the Soviet constitution, to state that the new structure of the country "grew and became strong as a result of the overthrow of the power of the landlords and capitalists and the conquest of the dictatorship of the proletariat," the new Polish constitution could not assert that communist principles had taken deep roots in Poland; its preamble affirms, as the main purpose of the constitution, the realization of the "great ideas of socialism." There is no mention of any dictatorship, but we find in the preamble a declaration that after "the power of capitalists and landlords has been overthrown, ... a new social system ... is taking shape and *growing in strength*" (emphasis supplied).

The sense of the preamble is that the transformation of the social foundations of the country is progressive, and article 3, clause 4, proclaims the fight against "those classes of society which live by exploiting the workers and farmers."

The result of this difference in the situation in Poland and that of the Soviet Union is that article 1 of the Soviet constitution can call the Union "a socialist state of workers and peasants," whereas article 1 of the Polish constitution defines the country as a "State of People's Democracy." According to the official theory, "people's democracies" are a form of dictatorship of the proletariat falling short of a perfect socialist state.

A further consequence of this difference is that in the Soviet Union there can be no other party than the communist, whereas article 72 of the Polish constitution, which enumerates the citizens' organizations permitted by law, also mentions political organizations. This is a theoretical difference, as in practice no open opposition to communism is allowed. In the early years of the present regime in Poland, the Polish Peasant Party tried to slow down the communisation of the country and to disagree with certain measures taken by the government. As a result, the leaders of the party had to escape from the country, others were arrested together with thousands of party members, and the party itself was integrated into another peasant party created by the communists.[3] Nevertheless, the constitutional permission of political activity creates

[3] The other two great Polish parties, the National Democratic and the Socialist ones, do not exist in Poland today. The parties "concessioned" or rather created by the communist government are the Christian Democratic and the Democratic, not to mention the new peasant party. All are under communist leadership. They presented, during the elections, common candidates with the communist (workmen's) party. After the liquidation of the Independent Peasant Party, there exists only the communist bloc.

the illusion of political freedom and is evidence that in communist eyes Poland is only in an intermediary stage towards complete socialization.

This is further evidenced by the fact that, unlike that of the Soviet Union, the Polish constitution does not yet nationalize all the means of production.[4] The socialization of plants and the confiscation of large and medium estates without any indemnity has been in effect for a long time,[5] but the individual ownership of small farms is still recognized, although agricultural collective farms receive special protection and assistance from the state (article 10). However, article 13 limits the constitutional guaranty of the right of inheritance to "personal" property.

The system of government, established by the constitution, more closely follows the Soviet pattern than its general provisions. In conformity with communist doctrine, no separation of powers is provided. The powers of the state are exercised, on the lower level, by "national councils" (articles 34–45) similar to the soviets of working people's deputies, provided for by article 94 of the Soviet constitution. The traditional Polish name for the country's parliament, the "*Sejm*", has been retained. There is no senate in Poland nor in any other communist state. According to the Soviet pattern, the constitution sets up a state council as the most important organ of the state. The council is equivalent to the presidium of the Supreme Soviet of the U.S.S.R., consists of 15 members, elected by the *Sejm*, functions in permanency, is endowed with very broad legislative and executive powers (the new constitution abolished the office of president of the republic), and has authority to exercise the whole of the *Sejm's* legislative power when the latter is not in session. Two yearly sessions of the *Sejm* are provided for by the constitution, but, as the practice of the last few years has shown, these are short and insignificant.

Article 25, clause 2, of the constitution states that the *Sejm* is an organ superior to the council. However, there is no provision respecting revocability of the council or of its individual members. Thus, the council seems to be quite independent.

The ministers of the state are appointed by the *Sejm* (article 29) and responsible to it and the state council.

The judiciary is composed of the supreme court, the *voievodship* (provincial) courts, the county courts, and the special courts (article 46). The members of the supreme court are appointed for a period of five years by the state council (art. 51). The judges of inferior courts are to be elected, according to the pro-

[4] Article 4 of the Soviet constitution provides: "The economic foundation of the U.S.S.R. is . . . the socialist ownership of the instruments and means of production, firmly established as a result of . . . the abolition of private ownership of the instruments and means of production."

[5] Decree of the P.N.L.C. of Sept. 6, 1944 (4 Dz.U. 17, 1944), as amended by decree of July 8, 1946 (34 Dz.U. 215, 1946); and decree of Aug. 8, 1946 (39 Dz.U. 233 1946). By virtue of Art. 19 (1) of the first mentioned decree, "the dispossessed former owners of estates . . . may be allotted a farmhold or will be granted as compensation the salary of a category VI government official" (as translated in 1 Rev. of Polish Law 9, 1947).

cedure fixed by statutes to be enacted (article 50). Inspired by article 113 of the Soviet constitution, the Polish constitution establishes the office of the general prosecutor, appointed by the state council and endowed with broad functions (article 54).

The reference to special courts which may be created by statute (article 46) shows that the present practice, according to which many important crimes (and particularly the political ones) are not passed upon by ordinary tribunals will be maintained. According to one statute, major political crimes are within the jurisdiction of military courts[6]; other statutes subject "economic crimes" to the jurisdiction of extraordinary "commissions," which have the power to decree the confiscation of property and confinement in compulsory labor camps for two years[7]. Article 53 enacts the principle of public judicial proceedings, but provides for exceptions settled by law. Statutes establishing secret hearings have already been enacted.[8]

A special chapter of the constitution is devoted to the "rights and duties of the citizens." Some of these "rights," such as the right to work, to rest, to the protection of health, to education and to the use of social establishments, are merely programmatic; others, such as the freedom of expressing one's opinions in print or personal inviolability, seem paradoxal in the light of the grim reality of the Communist regime, which penetrates into all the details of public and private life; still others are in effect nullified by additional clauses of the con-

[6] Special criminal courts were established on Sept. 12, 1944, by a decree of the "Polish National Liberation Committee," organized in Moscow, while the larger part of Poland was still occupied by the Germans (4 Dziennik Ustaw (Official Gazette) 21, 1944). The jurisdiction of these courts covered cases involving collaboration with the occupant and also included treason (decree of Nov. 4 1944, 11 Dz.U. 54, 1944; see also Art. 7 of the decree of the P.N.L.C. of Aug. 31, 1944, 4 Dz.U. 16, 1944).

The most flagrant exception to the principle of ordinary courts, however, is the decree of the P.N.L.C. of Oct. 30, 1944 (10 Dz.U. 50, 1944), which remains in force ever since it was enacted. Art. 16 of the decree subjects crimes against public safety and the state to the jurisdiction of the military courts (see also Art. 35 (1) of the decree of Nov. 16, 1945, 53 Dz.U. 300, 1945; Art. 51 of the decree of June 13, 1946, 30 Dz.U. 192, 1946).

The atmosphere in which the special criminal courts work is reflected in the summary of their procedural features, as given by the official publication of the Polish Ministry of Justice, 1 Rev. of Polish Law (1947) 12–13: "A trial is not required in matters within the cognizance of special penal courts . . . investigation is made by the prosecutor who may order preventive arrest and seizure of the property of the offender . . . the indictment does not require supporting evidence . . . the decision can be appealed from only by the prosecutor . . .".

[7] Among such commissions, the most important are: (a) the Special Commission for the Prosecution of Abuses and Corrupt Practices in the Management of Public Property, decree of May 16, 1946 (23 Dz.U. 14, 1946); Art. 10 (1) and (3) of the decree gives to the Commission the power to confine the wrongdoer to a forced labor camp and to confiscate his property; (b) the Special Commission to Fight Economic Abuses, created by the statute of June 2, 1947 (43 Dz.U. 218, 1947); Art. 17 of the statute grants to this Commission powers identical to those of the previously mentioned Commission.

[8] The most unequivocal provision in this respect is that of Art. 62 of the decree of the P.N.L.C. of Sept. 23, 1944 (6 Dz.U. 29, 1944), dealing with the procedure before military courts: "The trial proceeds behind closed doors."

stitution. Thus, article 70 of the constitution provides for "freedom of conscience and religion," but it adds that the abuse of this freedom "for purposes endangering the interests of the Polish People's Republic is punishable." Similarly, the theoretical freedom of association is rendered illusory by the prohibition of "setting up and participating in associations whose aims or activities are directed against the political and social structure or against the legal order of the Polish People's Republic."

Just before this issue of the Journal went to press, the first news of the provisions of the new Rumanian constitution, enacted on September 25, 1952, reached this country. This constitution replaces that of 1948 and carries forward the communisation of Rumania, going further in this direction than the new Polish constitution. E.g., article 126 states clearly that the communist party enjoys in the state the position of leadership.

But the most striking provision of the new Rumanian constitution is the one requiring the foreign relations of the state to be based on peace, friendship, and alliance with the Soviet Union and the countries of "people's democracies." Although other nations behind the Iron Curtain are also completely dependent on the Union, their constitutions purport to establish the principle of their complete independence in internal as well as in international relations. Rumania is the first country to establish friendship with the Soviet Union as a constitutional requirement. It may be said that this clause puts an end to the existence of Rumania as a theoretically independent nation.

W. J. WAGNER*

ENACTMENT OF A NATIONALITY LAW IN ISRAEL

Following the establishment of the State of Israel on May 14, 1948, one would have expected an act creating Israel citizenship to be among the first to be enacted by Israel's Parliament known as Knesseth. Such, however, has not been the case. Prolonged debating delayed the enactment of a nationality law until April 1st, and its going into effect until July 14, 1952.[1]

During the intervening four years, Israel, technically speaking, had no citizens. Although Palestinian citizenship became meaningless upon the termination of the British Mandate, the Palestine Citizenship Orders (1925–1942) remained on the law books of Israel, until they were repealed by the Nationality Law. Some of the reasons for the delay are given hereunder.

It was the historic bond between the Jewish people and the land of Israel that contributed largely toward the adoption of a resolution by the General Assembly of the United Nations, on November 29, 1947, which eventually led to

*Teaching fellow, Northwestern University Law School.

[1] This law was first published as a Bill in Hatsa'ot Hok No. 48 of 12 Tamuz, 5710 (27 June, 1950) p. 190. It was subsequently modified and, in its modified form, published as a new Bill in Hatsa'ot Hok No. 93 of 22 Heshvan, 5712 (21 November, 1951) p. 22. It was passed by Knesseth on 6 Nissan, 5712 (1 April, 1952) as Hok Haezrahuth (Nationality Law) 5712-1952. It was published in Reshumoth, the Israel Official Gazette, Sefer Hahukim No. 95 of 13 Nissan, 5712 (8 April, 1952) p. 146 and went into effect 21 Tamuz, 5712 (14 July, 1952).

the establishment of the State of Israel. The very objective was to provide a home for Jews, all over the world, who by virtue of this historic bond may wish to return to the land of Israel as one returns to a "homeland."

These considerations would seem to call for the granting of a special status to Jews vis-à-vis Israel. They found expression in the Law of Return which was enacted by Knesseth July 5, 1950, as a sort of precursor to the Nationality Law. The Law of Return declares, in its opening sentence, that every Jew has the right to immigrate to Israel.[2]

On the other side of the coin was the ardent desire of Israel's lawmakers to enact a nationality law so fair and liberal in its provisions as to reflect Israel's determination to serve as a forepost of democracy in the Middle East.

The debates, in and out of Knesseth, mirror the travail that was inherent in the formulation of a law that would succeed in striking a balance between the conflicting considerations. Among the various conflicts, two stood out with singular prominence. One concerns dual nationality. The other relates to racial discrimination. There were those who interpreted the Law of Return to mean that any Jew coming to settle in Israel should automatically acquire Israel nationality to the exclusion of any previous nationality. This school of thought sees in retention of previous nationality a negation of the ideology underlying the Law of Return. It cites in support of its views the United States where, for purposes of integration, dual nationality is forbidden. On the other hand, there were those who argued that, integration being a process of evolution that cannot be attained by coercive measures, a more liberal approach to the entire problem is needed. They maintained that, by adopting a policy of narrow nationalism, Israel would retard instead of accelerating the implementation of the Law of Return. Their views, shared by the Government, prevailed.

The principle of dual nationality has been recognized. Jews coming from countries permitting dual nationality may retain their previous nationality in addition to the nationality of Israel newly acquired. For the benefit of those who, coming from countries forbidding dual nationality, desire to retain their previous nationality, provision for "opting out" has been made.

At this point a brief note on the possible effect of Israel's Nationality Law upon American citizenship appears to be in place. In the case of *U. S. ex rel. Tracassi v. Karnuth* (D. C. N. Y. 1937, 19 Fed. Supp. 581) it was held that "one can owe allegiance to a single country only." However, when we look at the various contingencies[3] the occurrence of which, whether in the case of native-born or naturalized citizens, is cause for loss of nationality, we find that none covers such a case as automatic acquisition of Israel nationality.

It would seem, therefore, that as long as an American citizen who, not having opted out, automatically acquired Israel nationality, does nothing that would

[2] This law was first published as a Bill in Hatsa'ot Hok No. 48 of 12 Tamuz, 5710 (27 June, 1950) p. 189. It was passed by Knesseth 20 Tamuz, 5710 (5th July, 1950) as Hok Hashvuth (Law of Return) 5710-1950. It was published in Reshumoth, Sefer Hahukim No. 51 of 21 Tamuz, 5710 (6 July, 1950) p. 159.

[3] These contingencies are enumerated in Title III, Chapter 3, Sec. 349 of the Immigration and Nationality Act (Public Law 414) of June 27, 1952 (66 Stat. 163).

bring him within any of the contingencies enumerated in the American law as cause for loss of nationality, the citizenship of such a citizen would remain intact. Of course, any positive act, predicated on his newly acquired nationality, which would bring him within either one of the contingencies enumerated in the American law, such for instance as voting in a political election in Israel, will result in forfeiture of his American nationality. This view seems to be borne out by the fact that operation of foreign law which, under the provisions of the old law was an element in the forfeiture of American nationality,[4] has been eliminated from the corresponding provisions of the new law.[5] The view herein expressed finds further support in Sec. 356 of Public Law 414 of 1952[6] which provides that

> "The loss of nationality under this Chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Chapter."[7]

It is not unreasonable, however, to anticipate certain administrative problems, and possibly even litigation, to crop up from time to time, as the respective laws are being applied by the Governments concerned.

Next to the problem of dual nationality, Knesseth was troubled a good deal by another controversial point—racial discrimination. Although armistice agreements between Israel and Arab countries were signed in 1949 and, generally speaking, have since been in force, one cannot say that all vestiges of war have been done away with. Consideration of security are, and will undoubtedly continue to be for a long time to come, a most vital matter that touches Israel's very existence. This has necessitated a wary approach to that phase of Israel's Nationality Law which concerns the Arabs.

Legislators who saw racial discrimination in the least application of two different standards to the subject of nationality, in their zealous eagerness in behalf of the democratic character of Israel, opposed all such differentiation between Jews and Arabs as those of a more realistic bent proposed. The result, as is often the case in legislative processes, was a compromise between two factions.

As framed, Israel's Nationality Law provides for automatic acquisition of nationality not only by Jews, but by Arabs as well, with this difference however that, while in the case of the former the only prerequisite is either birth in or immigration into Israel, in the case of the latter such additional requirements as previous Palestinian citizenship, prior residence in Israel, and compliance with the Registration of Inhabitants Ordinance must also be met.

Aside from automatic acquisition of nationality, Israel's Nationality Law provides for acquisition of nationality by naturalization. The bulk of the 1,600,0000 inhabitants of Israel, including the bulk of her Arabs, acquired

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[4] Nationality Act of 1940, Sec. 404 (a); 54 Stat. 1170.

[5] Public Law 414, Sec. 352 (a).

[6] Almost identical with Sec. 408 in the Nationality Act of 1940.

[7] As to methods of expatriation under the Act of March 2, 1907, it was stated in an opinion of the Attorney General, that they were not necessarily exclusive, 30 Op. Atty. Gen. 411.

Israel nationality automatically on the 14th of July, 1952. Hereafter, it will be acquired automatically or by naturalization.

In evaluating the liberality and the democratic character of Israel's Nationality Law, regard must be had not only to the historic bond between the Jewish people and the land of Israel, and not only to general considerations concerning security, but also to the fact that, following the signing of armistice agreements, there has been a great deal of illegal infiltration from Arab countries into Israel. Consideration must also be given to the fact that, regardless of the manner in which nationality may be acquired, citizenship in Israel confers equal rights in all political and legal respects. In the light of the facts just alluded to, one is forced to the conclusion that Israel's Nationality Law represents as liberal a piece of legislation as existing conditions could produce.

Commenting on Israel's Nationality Law, Dr. Jacob Robinson, Legal Adviser to the Permanent Delegation of Israel to the United Nations, had the following to say:

> "Israel's Nationality Law is one of the most liberal pieces of legislation ever passed by any Government, on the subject of immigration, citizenship, and naturalization. . . . While the formulation of the conditions for the acquisition of Israel nationality by Arabs is somewhat different from that by Jews, the practical effect of mass naturalization is essentially the same. . . Israel citizenship will not be forced on any foreign national not desiring it. All foreign nationals may waive their right to Israel citizenship. . . . Foreign nationals and Israel citizens have the same rights in Israel; with the understandable exception that the former will not be able to participate in elections to political bodies. Israel legislation is more liberal than that prevailing in countries where the rights of aliens to reside, receive and give employment and practice professions is rigidly restricted."

Israel is in a state of flux. Drastic changes, in almost every endeavor, have taken place since May 14, 1948, the day on which the independence of the State was proclaimed. In the nature of things, the State of flux may well continue for a long time to come, bringing further changes in the life of the people and in the laws of the land. For as life changes, so does the law, and the law of nationality will be no exception. After peace shall have been established between Israel and the Arabs, the Nationality Law will, in all probability, undergo changes that will reflect the new state of affairs.

What is being done in Israel at present is the laying of foundations. On these foundations, the future will erect such structure as life itself will shape and fashion.

HAIM MARGALITH*

NEW LEGISLATION

HONDURAS: A NEW CODE OF COMMERCE—After long preparation, a new Honduran Code of Commerce has been adopted, dated February 16, 1950.[1] This,

*Member of New York and Israel Bars.

[1] The definitive publication of Decree No. 104 of March 10, 1951, which authorized the correction of the former publication of the Code, as well as Decree No. 73, which contains the Code itself, appeared in *La Gaceta*, official publication of Honduras, from November 10, 1951, to November 20, 1951.

the fourth Code of Honduras, repeals the Code of 1940,[2] which had replaced that of 1898, which in turn had amended the first Code of Commerce, enacted August 27, 1880.[3]

The new Code is divided into five books, comprising 1714 articles and twenty-one general or transitory provisions. Book I deals with merchants and their assistants; Book II with their professional obligations; Book III with objects of commerce; Book IV with obligations and commercial contracts; and Book V with bankruptcy and suspension of payment. The Code was prepared by a commission, composed of Dr. Joaquín Rodriguez, a Spanish jurist resident in Mexico, Lic. Roberto Ramirez, a scholarly Honduran lawyer, and Dr. Urbano Quezada, Minister of Finance, Public Credit, and Commerce of Honduras, who started work in 1948 on the draft of the projected legislation. They had the ambitious purpose to reform the commercial legislation on a completely new basis,[4] and although the commentators do not mention this, the new text is inspired by Mexican laws and projects,[5] in the making of which Dr. Rodriguez had participated. Fundamentally, the previous legislation was based on the Chilean Code of Commerce of 1865, which was the first American Code of an original nature.

Obviously, full comment on the Code of 1950 exceeds the limits of this note, but attention should be drawn to certain outstanding features in its structure. In the first place, the subject matter is defined by a different technique than in the Chilean Code. The Honduran Code does not enumerate acts of commerce; article 3 merely defines these as acts the purpose of which is to exploit, transfer, or liquidate a business enterprise, and acts analogous thereto, excepting those of an essentially civil nature, thus basing the field of mercantile law on a concept derived from the doctrines of Mossa and Escarra. Correspondingly, article 4 of the Code, which deals with objects of commerce, states that these shall include: (1) securities (*títulos valores*); (2) transactions or enterprises for profit and their elements, including especially industrial property, trade names, trade marks, and patents; and (3) ships. It should be understood that the matters enumerated in (1) and (2) and regulated by the Code of Commerce, include acts of individuals not engaged in commerce.

Concerning merchants, article 13 declares that, depending on their form but "irrespective of their purpose," certain companies, such as general partnerships, limited liability companies, and co-operatives, are commercial. Stock companies are also included as commercial organizations, but article 98 provides, as respects their control, for intervention of the public authority (*Ministerio de*

[2] However, article 1 of the Disposiciones Generales y Transitorias provides that Book III of the former Code of 1940 will still be vigorously enforced until the enactment of an Admiralty Code.

[3] This was a true copy of the Code of Commerce of Chile, from which country Honduras adopted most of its codes.

[4] See the "Bases Generales para la Redacción del Código de Comercio de Honduras," 16 Foro Hondureño, (1947) Nos. 10, 11, and 12, 336, Ch. I.

[5] Only once is the draft of the Mexican Code mentioned in the above-named Bases Generales.

Hacienda) only in order to authorize the offering to the public of subscriptions of shares. Supervision of stock companies is the responsibility of the *comisarios*, who may be partners or individuals outside the company—in any event, private persons—who do not, in our opinion, form a sufficient safeguard to guarantee the rights of the shareholders and the health of the national economy. According to the new Code, any type of company may be organized with the privilege of changing its capitalization.

Of particular interest is Title II of Book II, which concerns unfair competition, although the sanctions provided do not seem to be sufficiently stringent. The Code also admits, with certain limitations, the validity of contracts in restraint of the commercial activity of a merchant, but has no provisions for sanctions which may be imposed by the public authority when such agreements prejudice the national economy.

Title I of Book III, dealing with securities, contains novel provisions concerning titles of credit, as they are ordinarily termed, which are inspired by the modern, especially German, doctrines on the subject and consider the obligations incorporated in such instruments as abstract and independent of the legal transactions in which they originated. It is not difficult to recognize in the construction of this title the inspiration and teachings of the late Dr. Rodriguez, previously developed in the draft of the Mexican Code and in numerous texts and articles. The parts relating to bills of exchange, promissory notes, and checks are copied with slight modifications from the Geneva Uniform Laws of 1930 and 1931, concerning bills of exchange and promissory notes, and checks, respectively.

Title II deals in detail with the business enterprise and its elements. It is noteworthy that article 646 provides that the enterprise shall be deemed "a movable;" in consequence, acts concerning immovables are to be regulated by the rules of civil law. In view of their nature, immovables are not regarded as components of an enterprise, unless expressly included, e.g., in cases of transfer, lease, etc. of the enterprise. (Article 648).

In Chapter II of Book IV, the Code deals with contracts and unilateral acts in general. Its provisions are quite advanced and to a large extent original. Also, Book IV treats certain modern contracts, which do not appear in other American codes, such as those of publishing, inn-keeping, liability and accident insurance, procurement and supply, sales in which the price is set by a third party (*estimatorio*), bank credit, contracts to postpone delivery of stock, etc.

Bankruptcy, treated in Book V, applies only to merchants. The assignees may be a bank, chamber of commerce or industry, a commercial company, or individual merchant, depending on the choice of the judge. There is no regulation of bankruptcy by the government, other than by the judiciary.

The new Commercial Code of Honduras of 1950[6], although praised for the

[6] In accordance with article 7 of the Disposiciones Generales y Transitorias, the Code went into effect twenty days after its publication in *La Gaceta*.

work which it represents,[7] has also provoked adverse criticism in the short time since it has been issued, principally because of its faulty draftsmanship and because it has adopted the laws and projects of Mexico without due consideration to ensure their adequate concordance with Honduran legislation.[8] Where the code is silent, the "mercantile usages and customs, and in default of these, the norms of the civil law" apply.

JULIO OLAVARRIA A.*

INTER-AMERICAN PROTOCOL ON POWERS OF ATTORNEY—The needless complexity of the formalities and requirements for powers of attorney to be used abroad, especially in many Latin American countries, has long plagued business men and their lawyers (see Eder, "Powers of Attorney in International Practice," 98 Univ. of Pa. L. Rev. (1950) 840 (translated La Ley (Buenos Aires) April 24, 1951), Seventh Conference Inter-American Bar Association, Montevideo, November, 1951; Pan American Convention for Simplification of Powers of Attorney. New York (1951) in English and Spanish). The International and Comparative Law Section of the American Bar Association dealt with the subject some years ago. A sub-committee (David Grant, chairman) prepared a draft law. This was submitted by the Pan American Union to a Committee of Experts, pursuant to a resolution (No. 48) of the Seventh Conference of the American States. A Pan American Convention or Protocol was finally arrived at and signed by five countries on February 17, 1940, with some reservations, the Convention being open to adherence by other members of the Pan American Union. Only Colombia enacted it into law (Law 10 of 1943). The requirements under it are still unnecessarily technical, the American Bar Association suggestions having been only partially adopted, but it is a substantial improvement over the existing procedure imposed by many countries.

Accordingly, the Seventh Conference of the Inter-American Bar Association, held at Montevideo, November 1951, among other resolutions adopted on the subject, on the motion of the undersigned recommended the approval by the member states of the Pan American Union of the said Protocol.

It is gratifying to note that speedy results followed, at least in one country. Mexico, by Decree of December 28, 1951 (Diario Oficial, February 2, 1951) published the Law approving the aforesaid Inter-American Protocol on Powers of Attorney, subject however, to the reservations made by the Mexican Government. While Mexico is one of the less difficult countries in respect of powers of attorney, its adoption of the Protocol marks a decided step forward. With

[7] "There is no doubt that this Code constitutes the most serious attempt at codification that our country has undertaken in many years," says Rogelio Martinez A. in "Notas al Nuevo Codigo de Comercio," 20 Foro Hondureño, (1950) No. 4, 118.

[8] See the article mentioned in note 7. Unfortunately, it contains only the commentary up to article 109 of the Code and is not continued.

* Professor of Commercial Law, University of Chile, research associate, University of Michigan Law School.

the example of two such important countries as Colombia and Mexico, its adoption by other nations should be facilitated.

COLOMBIA: CONTROL OF LIMITED LIABILITY FIRMS; IMPORT OF FOREIGN CAPITAL—The limited liability firm (*sociedad de responsabilidad limitada*) had become increasingly popular in Colombia, both with foreign and domestic investors and entrepreneurs, because of its freedom from government inspection and control (see Eder, "Limited Liability Firms Abroad," 13 Univ. of Pittsburgh L. Rev. (1952) 193). By decree No. 2831 of November 19, 1952 (El Siglo, Bogotá, November 20, 1952), this advantage has been in large part swept away. The new decree extends the jurisdiction of the Superintendent of Share Companies to limited liability firms and other partnerships if 33% or more of their subscribed capital is owned by a stock corporation. In such case application must be made to the Superintendent by firms heretofore organized for authority to continue doing business. They must file balance-sheets, provide proportional voting for directors, and will be subject to government inspection and to sundry other rigorous provisions and requirements embodied in the corporation laws.

This decree, by its extension of government intervention, however logical it may seem, is an unfortunate step backwards which may tend to further discourage foreign capital investment.

On the other hand, Colombia has also attempted to attract foreign capital by a new Law (Law 8 of 1952, July 18; Diario Oficial No. 27,969, August 5, 1952). Importation of foreign capital is declared free and entitled to be reexported and to exchange licenses for the remittance of profits thereon. Registration with the Exchange Control Board is required, and other formalities, in order to obtain exchange licenses. Special provisions govern the importation of capital in machinery and equipment. Capital imported prior to the law is entitled to the same privileges provided legal requirements were duly complied with at the time of investment. A minor tax benefit (exemption from the *patrimonio* or capital tax for five years) is granted to new industries employing only Colombian raw materials. It is doubtful whether the desired stimulation of foreign investment will be effective as long as exchange control and other discouraging factors continue to exist.

MEXICO: AMENDMENT OF THE CIVIL CODE—The Decree of December 31, 1951 (Diario Oficial Jan. 18, 1952) promulgates the law of amendments to the Civil Code on the formalities of holographic wills, instalment sales, surety bonds, pledge, Public Property Registry, and juristic persons. Many of the amendments are merely in phraseology or arrangement in the Code. Among others may be noted the requirement for deposit in the General Notarial Archives as a requisite for the validity of holographic wills, instead of the Public Registry. Respecting conditional sales, in lieu of specifying examples of chattels identifiable with certainty, the determination is left to executive regulation (art.

2310). The list of documents subject to registration in the Public Registry (art. 3005, former art. 3002) is considerably shortened by generalization, but does not seem to make any substantial innovation in the law except for registration of acts executed abroad (art. 3006, former art. 3005). It now reads (new matter in italics):

"Acts executed, contracts made and judicial resolutions rendered in a foreign country shall be recorded only if the following circumstances exist: (1) That if such acts or contracts had been executed or such judicial resolutions rendered in the Federal District or Territories *they would have been recordable* (instead of "it would have been necessary to record them"). (2) *That the acts or contracts presented for recording are not in conflict with Mexican prohibitory laws or laws of public policy.* (3) That they are duly legalized *and have been protocolized before a Notary pursuant to judicial order. To obtain an order for protocolization of documents in a foreign language, they must first be translated by an expert appointed by the judge* (an unnecessarily burdensome requirement). (4) If they are judicial resolutions, that their execution be ordered by the proper national judicial authority." (Schoenrich's translation, Civil Code of Mexico (1950) adapted).

Article 3009 (former article 3007) adds a presumption of good faith in behalf of a purchaser. Other presumptions in favor of record title owners are laid down by article 3010 (new, amending former article 3008) and following articles. The articles as to the Public Registry contain many amendments of substance as well as in phraseology and arrangement, community property (conjugal partnership) being specially dealt with. Articles 3065 and 3066 on inscription in the Registry of juristic persons are new; they include foreign associations and "civil" partnerships.

PANAMA: CHATTEL MORTAGE AND CONDITIONAL SALES LAWS[1]— There has hitherto been an inexplicable reluctance in Latin-American legislation to extend the concept of mortgage (*hipoteca*) to property other than immovables and ships. The Civil Code of Panama, art. 1567, limited mortgage to immovables and to real rights therein. A variety of names has been adopted in passing chattel mortgage legislation (*prenda agraria, prenda industrial, prenda con registro, prenda sin desplazamiento*, etc.). Panama, in this law, is the first country to adopt the word *hipoteca*. The law includes an amendment of Art. 1567, adding a new paragraph to this effect. Decree 117 of July 8, 1925, the former enactment on the subject, is also amended.

More important than the question of phraseology has been the frequent inefficacy of these statutes to protect a mortgagee or conditional vendor (see: Association of the Bar of the City of New York (Foreign Law Committee) Chattel Liens and Conditional Sales in Latin America, in 1926 Year Book 393; 1929 *id.* 348; 1931 *id.* 282; Eder, A Comparative Survey of Anglo-American and Latin-American Law (1950) 71 *et seq.*, 102). This law would seem to be an

[1] No. 21 of February 15, 1952 (sobre hipoteca de bienes muebles, Gaceta Oficial No. 11,724, March 7, 1952; reproduced in 5 Boletín del Instituto de Derecho Comparado de México, No. 14, May–August 1952, pp. 160–166).

improvement. Its provisions are applicable to conditional sales (art. 21), but no right of repossession is granted; court procedure is required. Double damages and penal sanctions are provided (arts. 11, 12). The maximum interest rate is 12%; for "agrarian pledges" 7% (art. 14, par. 11).

On the same date, a special law (No. 22, *Gaceta Oficial* No. 11,727, March 11, 1952; *Boletín*, *supra*, pp. 166–172) was enacted covering chattel liens of agricultural machinery and equipment, live stock, and pending or future crops. The name agrarian pledge (*prenda agraria*) is here retained. It seems intended especially to facilitate refinancing by the issuance by the Registrar of a negotiable pledge certificate (arts. 6, 7), enforceable by summary procedure (arts. 18 *et seq.*).

PHANOR J. EDER*

DECISIONS

POLITICAL STRIKES UNDER GERMAN LAW—"Political strike," a term quite recently introduced into German labor law,[1] denotes a strike directed against the state and its authorities. The usual definition of strike, under both American and German labor law, is a suspension of work in order to exert pressure upon *employers* to make them accept the demands of the striking employees, such suspension being intended to be temporary and working relations to be resumed when acceptable conditions are obtained[2]. In case the exertion of pressure is used against, or in favor of, *officials*, i.e., against the representatives of the power vested in the state and its authorities, according to the German doctrine the strike will be classified as "political."

The leading example in Germany is the so-called Kapp-Putsch in 1920. Allegedly "to protect and to preserve" the Weimar Constitution of 1919, a general of the army supported by two brigades of the *Freikorps*,[3] occupied Berlin, expelled the legal government, and formed a new cabinet, the Kapp-Lüttwitz-Regierung. The trade unions, in retaliation, instituted a nation-wide general strike, intended to obstruct the activities of the unconstitutional government, and effectuated the total breakdown of the revolt within seven days after its inception[4]. The purpose of this strike was to defend the constitutionality of the German government, this being no doubt a political aim, and it may thus be characterized as a political strike.

The recent history of postwar Germany provides two further examples of

* Board of editors.

[1] *Cf.* Gerhard Müller, "Grundfragen des Streikrechts," Recht der Arbeit, (1951) 247 *et seq.*

[2] For American law, see e.g., Millis & Montgomery, Organized Labor (1945) 554. As to German labor law, *cf.* Nipperdey, Süddeutsche Juristenzeitung (1949), 811; or Gerhard Müller, *ibid.*

[3] The socalled *Freikorps* were armed bodies acting independently of the government and often making their own policy.

[4] For special questions in connection with the Kapp-Putsch, see "Putsche" in Stier-Somlo-Elster, 4 Handwörterbuch der Rechtswissenschaft (1927) 625.

political strikes. Late in 1950[5], the D. G. B., which as a federation of almost all trade unions practically has a monopoly in representing labor in West Germany, confronted the government with an ultimatum. The demand was that the Bundestag should pass a statute providing for economic codetermination by union representatives in the boards of directors of the coal, steel, and iron producing companies.[6] If enactment of this statute should be delayed beyond February 1, 1951, a strike of the coal, steel, and iron industry was to take place. Intimidated by this threat, parliament obeyed, although there had been strong opposition against the proposed statute before the strike was announced.[7]

This was a threat of a political strike in the sense mentioned above. Its legal aspects were discussed at length in the professional literature. Union writers referred to the Kapp-Putsch, urging that the protection and realization of constitutional provisions by means of strikes is lawful and desirable. However, there was no proof that economic codetermination has constitutionally been provided or contemplated. Therefore, the overwhelming professional and public opinion was that a strike to force enactment of a law without free parliamentary decision was unlawful, and might warrant action to recover damages.[8] But there were only lengthy discussions of the question, and no judicial decisions. As a matter of fact, in the course of the struggle for power between the young West German state and the D. G. B., which had by degrees gained importance after 1949, the state lost the first open contest.[9]

In June, 1952, the second round of this struggle took place. The parliament was about to discuss a statute regulating the activities of the works councils, the *Betriebsverfassungsgesetz*.[10] The D. G. B., claiming that "the debates on

[5] D.G.B. means Deutscher Gewerkschaftsbund, a federation of almost all important trade unions in West Germany. For special aspects, see Kronstein, "Collective Bargaining in West Germany," 3 The American Journal of Comparative Law (1952) 199 *et seq.*; Gillen, Labor Problems in West Germany, (Hicog publication, 1952) 11.

[6] "Codetermination (*Mitbestimmungsrecht*) has become the most important goal of the West German labor movement during the postwar period," quoted from Gillen, *ibid.*, 43. A concise report on the history of the struggle for codetermination in the West German steel and coal industry will be found in this publication, pp. 43–65.

[7] For details, see also the informations in Recht der Arbeit (1950) 461; (1951) 15; and Boldt, "Das Mitbestimmungsrecht in Eisen und Kohle," Recht der Arbeit (1951) 169. On the statute itself, see note 36, *infra*.

[8] Hessel, Betriebsberater (1950) 86; Gerhard Müller, Recht der Arbeit (1951) 249; Der Volkswirt (1951/52) 13; Dittmar, Betriebsberater (1948) 516; Kauffmann, Der Betrieb (1951) 466; Schilling, Juristenzeitung (1951) 122; unpublished opinions by Prof. Heinrich Lehmann of January 8, 1951, and Prof. Rolf Dietz of January 10, 1951; correspondence between Bundeskanzler Dr. Adenauer and D.G.B. Vorsitzender Dr. Boeckler, reported in Recht der Arbeit (1951) 15; Landesarbeitsgericht Frankfurt am Main, Recht der Arbeit (1950) 428; Fikentscher, Schadensersatz aus rechtswidrigem Streik, unter besonderer Berücksichtigung des politischen Streiks, Diss. München (1951).

[9] The problem of these two powers in competition is discussed by Kronstein, *ibid.* 212.

[10] The draft had been introduced by the cabinet on Oct. 31, 1950, and was thenceforth debated in various committees. The history of the German works council movement is outlined by Gillen, ibid. 30 *et seq.* The full text of the Betriebsverfassungsgesetz is published in Recht der Arbeit (1952) 313.

the draft had come to an end unsatisfactory to the trade union movement," notified the government that it was prepared to strike in order to delay enactment of the statute and to enforce the introduction of a new, "satisfactory" draft.[11] However, on this occasion parliament determined in spite of the threat to pass the act as drafted and discussed. Consequently, a number of political strikes, particularly sitdown strikes, and some other demonstrations occurred, but without the success the unions sought. The *Betriebsverfassungsgesetz* was enacted,[12] and the strikes were suppressed.

Some legal problems arising out of the strikes remained to be solved. Shortly before the strikes began, the *Bundesvereinigung der Deutschen Arbeitgeberverbände*[13] published on May 20, 1952, a statement on behalf of the employers involved that suit would be brought for all damages caused by the strikes.[14] Along with this declaration, some employers made known to their employees that immediate dismissal would be the effect of participating in any strike undertaken with the intention to exert pressure on the parliament. Both these courses of actions were carried out, leading to the labor court decisions to which reference is made below.[15]

I. *The Damage Problem.* Preparatory to instituting the damage suits announced by the declaration of May 20, 1952, the *Bundesvereinigung der Deutschen Arbeitgeberverbände* solicited the opinions of Prof. Ernst Forsthoff, teaching constitutional and administrative law at the university of Heidelberg, and Prof. Alfred Hueck, professor of business and labor law at the university of Munich, on the legal significance of the strikes of June, 1952.[16] In their opinions, which digested the literature on the subject of political strikes and examined all relevant questions of fact and law, both experts concluded that the Bundestag in discussing and enacting the *Betriebsverfassungsgesetz* was exercising its

[11] For details of this period, see Recht der Arbeit (1952) 215, 254, 255.

[12] The formal proclamation has had to be postponed until Control Council Law No. 22 (Betriebsrätegesetz) is repealed by the Allied High Commission, see Betriebsberater (1952) 774, information No. 1680. According to newspaper reports, the Betriebsverfassungsgesetz will be proclaimed on November 14, 1952.

[13] Association of the employers' organizations.

[14] The full language of this declaration is reprinted in Recht der Arbeit (1952) 217.

[15] It may be asked why the employers did not make use of the *Einstweilige Verfügung*, which corresponds to the injunction under American law. Probably the employers believed, with some reason, that no general strike was contemplated by the unions. Thus, the damages could be expected to be relatively small. On the other hand, to sue out an *Einstweilige Verfügung* at German law requires not only that urgency be proved, but also that the claim in question be legally substantiated. The issue would have been the legality or illegality of political strikes. This being a novel question, it was anticipated that the proceedings in an *Einstweilige Verfügung* would practically take the same time as an ordinary lawsuit, so that it could not paralyze the strike actions effectively. Thus, the employers preferred to postpone their redress to actions for damages in the usual way later.

[16] Both opinions have been published under the title "Die politischen Streikaktionen des Deutschen Gewerkschaftsbundes anlässlich der parlamentarischen Beratung des Betriebsverfassungsgesetzes in ihrer verfassungs- und zivilrechtlichen Bedeutung," Schriftenreihe der Bundesvereinigung der Deutschen Arbeitgeberverbände, Heft 6, 1952.

constitutional power, and that a strike against such constitutional exercise of the legislative power is illegal and ground for an action for damages.[17]

Encouraged by these expert opinions, some newspaper editors filed actions to recover damages, since one of the strikes of June, 1952, was a two-day walkout involving the entire West German newspaper industry, designed by a comparatively small loss of wage hours to register a sharp protest against the labor policy of the parliament regarding the works council statute. Two labor courts held the strike to be "unlawful and immoral" on the ground that it tended to force the parliament to enact a works council statute exclusively reflecting the desires of the unions.[18] Each court entered a judgment awarding damages against the D. G. B.[19] and the union covering the paper and printing industry, and against both their leaders.[20]

It is to be expected that these precedents, holding political strikes against the constitutional exercise of the parliamentary right freely to discuss and enact a statute to be illegal and awarding damages on the ground of this illegality, will control future decisions. The rule established by the labor courts corresponds to a basic concept of democracy that the authority delegated by the people to determine the will of the state must be responsible to all the people, not to a single, though powerful, pressure group.

There is more controversy, however, on the second point with which the courts had to deal in connection with the political strikes of June, 1952, namely,

[17] It may be worthwhile partially to render excerpts from the final dicta of these opinions (author's translation):

FORSTHOFF: . . . 3. A strike intended to cause economic disorder, and thereby to exert pressure upon the Bundestag, in order to force it to agree upon provisions for works council codetermination which it never would have agreed upon by free decision, constitutes an assault upon the constitutional procedure of determining the will of the state. . . . Such a restraint (*sc.* of parliamentary power) being violative of the procedure to determine the will of the state, is at all events, and obviously, unconstitutional.

HUECK: A strike entered in order to gain influence upon the legislative body is in violation of "good mores" and illegal. It therefore creates an obligation under §§ 823 I, 826 BGB, to pay for the employers' damages which are caused by the walkout. The obligation is cast upon (a) the D.G.B., (b) the several industry unions, inasmuch as they have joined the strike, (c) the union leaders who started or who helped to start the strike.

[18] Arbeitsgericht Köln, of August 23, 1952, Ca 1230/52; Arbeitsgericht Marburg, of August 28, 1952, A 368/52; see Betriebsberater (1952) 774.

[19] See note 5, *supra*.

[20] The courts failed to discuss a question of some delicacy. By definition, an illegal political strike is directed against the constitutional exercise of state power, and not in the first place against the employers. Why then should the employers have the right to sue for damages when the illegality of a strike originates in the union-state relationship? Under German law the basic question whether A may recover damages from B, if B has intentionally injured A's general assets by an act "immoral" in relation to C, is unsettled. Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl., §826 (4), takes the stand that only he against whom the immoral act was directed is entitled to recover. However, there is some authority (see Staudinger, *ibid.*, and RGZ 142/228—decision of the *Reichsgericht*) that an immoral act as such is sufficient to create an obligation of damages, irrespective of against whom the immoral act was directed. In the cases before us, the courts tacitly followed the latter theory in awarding damages in favor of the employers.

the question of immediate termination of individual labor contracts in case of a political strike.

II. *The Termination Problem.* Under American labor law, the individual employee's relationship with his employer[21] continues to exist for some purposes even in case a strike temporarily interrupts factual performance of the contract of employment. "Under the National Labor Relations Act the action of employees in striking in connection with a current labor dispute is not construed as a renunciation of the employment relation."[22] In other words, subject to certain limitations, employees have "a right to strike and picket,"[23] which precludes their being held chargeable with breach of contract unless the strike is in breach of a no-strike covenant. Except in the case of the no-strike pledge, the employer therefore has no right of dismissal but *only* a right of replacement, in the event he desires to continue his business and a new employee offers his service.[24]

Similarly, under German labor law a strike normally does not rescind the employment contract.[25] But there is serious question whether or not an employee is bound to terminate before striking in order to be relieved from the contractual obligation to work. The "classical" theorists assert that the absence of any legal, let alone statutory, provision that there is a right to strike operates as a defense to the consequences at law ensuing upon breach of contract.[26] "The constitutional right to organize unions[27] does not liberate the individual employee from his obligation under private law which he has undertaken as defined by his employment contract."[28] The result is that an employee engaged in a strike without having terminated his contract acts in violation of his duty to work as stipulated in the labor contract. This violation, under §123, No. 3, of the *Gewerbeordnung*,[29] empowers the employer immediately to dismiss the

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[21] Hoeniger, in "Einige grundlegende Unterschiede zwischen amerikanischem und deutschem Arbeitsrecht," Recht der Arbeit (1952) 241, expresses some doubts on the point whether under American labor law a contract is regarded to be the basis of the employer-employee relationship. But Dangel and Shriber, The Law of Labor Unions (1941) 7, §7, define "employee" as a "person in the service of another under a *contract* for hire . . .," quoting McDermott's Case, 283 Mass. (1933) 74; Werner v. Industrial Comm. 212 Wis. (1933) 76.

[22] See N.L.R.A., U. S. Stat. 449, §2, subd. (3); and Dangel and Shriber, *op. cit.* 417, §387, quoting a series of cases concerned with this problem.

[23] *Op. cit.* 410, §380.

[24] *Ibid.*, and Hoeniger, *ibid.*

[25] Nipperdey, in Hueck-Nipperdey, Lehrbuch des Arbeitsrechts, 3.–5. Aufl., (1932), 2 Band, 652. As an example of recent jurisdiction, *cf.* Landesarbeitsgericht Bremen, of March 19, 1952, Sa 9/52, Recht der Arbeit (1952) 238, No. 68.

[26] Nipperdey, *ibid.* 661; Nikisch, "Die privatrechtlichen Wirkungen des sog. Streikrechts, Rechtsgutachten," Schriftenreihe der Bundesvereinigung der Deutschen Arbeitgeberverbände, Heft 1 (1951) 18 *et seq.*; Nikisch, "Streik und Arbeitnehmer," Betriebsberater (1952) 721, quoting further literature. Nikisch here describes the classical theory as the dominating one.

[27] Art 9 III Grundgesetz für die Bundesrepublik Deutschland (constitution).

[28] Landesarbeitsgericht Bremen, see note 25, author's translation.

[29] The *Gewerbeordnung*, a voluminous statute regulating trade and labor issues, dates back to 1869. §123, No. 3, in its present language was inserted by a statute of June 1, 1891, RGBl.

employee even without replacing him. This is the reason why every ordinary labor dispute in Germany usually begins with formal termination of all individual labor contracts by the employees involved and why the unions in planning a strike advise their members to terminate.

The "modern" doctrine, on the other hand, deems it necessary to replace old-fashioned patterns of civil contract law by modern principles of labor dispute collectivism, urging that the object of a strike is not to *cease* employment but to *improve* its conditions; that it is unsound, therefore, to demand termination before striking. "The quitting of work in connection with a strike called by unions is, without precedent termination, a mere consequence implied in the strike as a legal institution" (*sc.* of collective bargaining).[30] It is obvious that in case of a strike the modern doctrine tends to protect the worker from being dismissed or replaced, by granting to him a "right of strike" as a defense against breach of contract responsibility.

This dispute between the "classical" and the "modern" theories is the legal background of two further German labor court decisions arising out of the political strikes of June, 1952. Some employers had warned their employees against joining the strikes and had announced their intention to exercise their rights of dismissal. The strikes began *without* terminations on the part of the strikers and, in terms of the classical theory, were therefore violative of the labor contracts. The employers gave notice to some of the strikers, two of whom, probably to start test cases in different regional courts, sued their employers by seeking declaratory judgments that the notices were void and the contracts still existing.

One court (Arbeitsgericht Düsseldorf)[31] fully applied the classical doctrine and dismissed the action, upholding the employers' termination. The court was of the opinion that a strike does not free the employee from his contractual duties. In addition, the court based its finding on the ground that the strike itself was *illegal* because it was directed against the authority of the state. The other court (Arbeitsgericht Frankfurt am Main)[32] decided in favor of the plaintiff and held the notice of immediate dismissal void. Yet it did not apply the modern doctrine as one might assume in view of the result. The court argued that the plaintiff, as a matter of fact, erred concerning the *illegality* of the strike which he had joined, since in his judgment he had believed it to be lawful, and

S. 261. §123, No. 3, reads in part: "... laborers and employees may be dismissed without delay ... in case they have unlawfully laid down their work, or otherwise persistently refuse to fulfill the obligations incumbent on them according to their employment contract."

[30] Landesarbeitsgericht Stuttgart, March 28, 1952, II Sa 228/51, Recht der Arbeit (1952) 238. Exponents of the modern doctrine are Hessel, Betriebsberater (1951) 86 and Recht der Arbeit (1952) 48; Gerhard Müller, Recht der Arbeit (1951) 247. See also Arbeitsgericht Göttingen, on August 23, 1951, Betriebsberater (1951) 699 and on April 10, 1952, Arbeitsrechtliche Praxis (1952) No. 103.

[31] Arbeitsgericht Düsseldorf, July 23, 1952, 1 Ca 577/52, Betriebsberater (1952) 774.

[32] Arbeitsgericht Frankfurt am Main, on August 17, 1952, 4 A 449/52, Betriebsberater (1952) 774. The cases cited in notes 18, 31, and 32 have been brought to the Landesarbeitsgerichte for new trial. However, the legal problems, as discussed in this report, will be the same in those courts.

that in consequence of this error, the requirements for immediate dismissal as embodied in §123, No. 3, of the *Gewerbeordnung*, namely "the unlawful laying down of work, or other persistent refusal to fulfill the obligations under the contract,"[33] were not satisfied. Thus the court, in examining and denying the applicability of §123, No. 3, of the *Gewerbeordnung*, tacitly adopted the classical theory; under the modern doctrine which denies the possibility of *any breach* of contract by a strike, the issue whether the statutory requirements for immediate dismissal are met or not could not have been raised.

Thus, it still remains an open question how such a case might be resolved by a court rejecting the classical and following the modern doctrine. The decision would depend on whether the "right to quit work which is implied in the strike as a legal institution" would be regarded as including strikes for political goals, or is to be restricted to genuine labor disputes. At any rate, four precedents hold the political strike against the constitutional exercise of parliamentary power illegal. It may fairly be stated that the second round of the struggle between state authority and union power has ended in favor of the state.

There is some chance that West Germany may be the scene of similar duels between the state and the unions, at least until both powers shall have found some settled correlation within the structure of the West German democracy. Further claims are being made by the D. G. B. for statutory enactment[34] of the 40-hour week,[35] and for codetermination in additional fields of business, such as chemistry and railroads.[36] Whether strikes will be used to enforce these demands and what the reaction of the courts will be, remains to be seen.

WOLFGANG FIKENTSCHER*

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[33] *Cf.* note 29, *supra.*

[34] There is a general trend in German labor law to rely on legislation rather than on collective bargaining. For the reasons of this, see Gillen, *ibid.* 15, 20.

[35] *Cf.* Recht der Arbeit (1952) 178.

[36] Up to now, codetermination exists only in the iron, steel, and coal industry, based on the Gesetz über die Mitbestimmung der Arbeitnehmer in Unternehmen des Bergbaus, sowie der Eisen und Stahl erzeugenden Industrie, of May 21, 1951, BGBl. I. 347. With reference to further plans of the D.G.B., see "Entschliessung des ausserordentlichen Bundeskongresses des D.G.B. vom 23.6.51 zum Mitbestimmungsrecht in der chemischen Industrie, der Kohlechemie und der Bundesbahn," Recht der Arbeit (1951) 346.

* Dr. Jur. (Munich), graduate fellow, University of Michigan Law School.

Digest of Foreign Law Cases

Prepared by

Martin Domke, New York, N. Y., Chairman; J. Chrys Dougherty, Austin, Texas; Antonio R. Sarabia, Chicago, Illinois; William B. Stern, Los Angeles, California; and William M. Sutherland, Boston, Massachusetts: Committee of the American Foreign Law Association.

(All decisions were rendered during the year 1952)

Acheson v. Albert, 195 F. 2d 573 (C. A. Col.): derivative citizenship of child born in Poland.

Acheson v. Wohlmuth, 196 F. 2d 866 (C. A. Col.): participation under duress in 1946 election in American occupied zone of Germany.

Ambatielos v. Foundation Co., 116 N. Y. S. 2d 641: enforcement of English judgment; invalidity of agreement for obtaining government contracts under Greek statute of 1931.

Anderson v. Morrison-Knudson Co., Inc., N. Y. L. J., November 20, 1952, p. 1226: limitation for filing claim arising in Casablanca, French Morocco.

Angarita (*Matter of Angarita v. Court of Special Sessions of the City of New York*), N. Y. L. J., May 19, 1952, p. 1994: filiation proceeding by Venezuelan mother with respect to children in Canada.

Archduke Franz Josef v. Princess Ileana of Romania, N. Y. L. J., November 5, 1952, p. 1056: power of attorney for property located in Austria.

Aron v. Snyder, 196 F. 2d 38 (C. A. Col.): attorney's rights under award of Mixed Claims Commission (United States and Germany) implemented by Private Law 509 of 1940.

Artukovic v. Boyle, 107 F. Suppl. 11 (D. C. Cal.): extradition treaty with Serbia of 1902 not in force between U. S. and Yugoslavia; judicial question to be decided by courts and not by executive department.

Association of Polish Lawyers, Inc., N. Y. L. J. August 28, 1952, p. 327: application denied, doubt as to "professional propriety of associating members of the Bar according to their nativity."

Ball, Estate of Rudolph B., N. Y. L. J. May 15, 1952, p. 1954: distribution according to law of Germany as deceased's domicile.

Bank of Nova Scotia v. San Miguel, 196 F. 2d 950 (C. A. 1): statute of limitations for bill of exchange under law of Dominican Republic.

Baras Plantation Co., Inc. v. United States, 105 F. Supp. 1003 (Court of Claims): recovery for destruction of palm trees by U.S. army in Philippines after Japanese occupation.

Bata v. Bata; Svit National Corporation, Intervenor, 304 N. Y. 644: appearance of attorneys appointed by national administration in Czechoslovakia.

Beley v. Pennsylvania Mut. Life Ins. Co., 90 A. 2d 597 (Super. Ct. Pa.): recovery under double indemnity provisions of life insurance policy of infantryman killed in Korea.

Benaki v. Teryazos, N. Y. L. J. September 11, 1952, p. 446: custody of Greek children as temporary visitors to U.S.

Bondy, Estate of Julia B., N. Y. L. J. November 6, 1952, p. 1073: will executed in Czechoslovakia; shares of legatees residing in Czechoslovakia.

Buscema v. Buscema, 20 N. J. Super. 114, 89 A. 2d 279 (Super. Ct. New Jersey); Italian seaman illegally in U. S. not bona fide resident; no jurisdiction for divorce from wife residing in Italy.

Caravas, In re C. Estate, 112 A. C. A. 637, 247 P. 2d 35 (C. A. Cal.): rights of Greek heir in California estate escheated to State of California because of his nonappearance within statutory five-year period in spite of

disability to commence action during state of war with German-occupied Greece.

Calmar S.S. Corp. v. Scott, 197 F. 2d 795 (C. A. 2): war risk policy on merchant vessel (Portmar) operating in February 1942 in Pacific war zone.

Carr v. Yokohama Specie Bank, Ltd., C. A. 9, No. 13156, November 14, 1952: trustee in bankruptcy of estate of Nippon Yusen Kaisha, Japanese shipping corporation; power of attorney given by Japanese government.

Catrakis v. Jaris, 280 App. Div. 414 (N. Y.): "liquidating assignee" of judgment creditor appointed by stockholders' meeting in Greece.

Codray v. McGranery, D. C. Col., No. 2405–52, November 7, 1952: unlicensed attachment of blocked property of Hungarian corporation.

A. M. Collins & Co., v. Panama R. Co., 187 F. 2d 893 (C. A. 5): limitation of liability under Canal Zone Civil Code, Title 2, sec. 933.

Cotsirilos v. Cotsirilos, N. Y. L. J. October 23, 1952, p. 922: denial of injunction against Mexican divorce action instituted by husband physically present in Mexico.

Cross v. Pace, 106 F. Supp. 484 (D. C. Col.): action against Secretary of the Army of U.S. for destruction of dam constructed by Canada in St. Lawrence River.

Day, Estate of Elias D., N. Y. L. J. September 2, 1952, p. 349: dowry under Greek law.

Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Nat. Bank of Roumania, N. Y. L. J. August 13, 1952, p. 244: Rumanian law on the liability of bank for service of "Roumanian Four Per Cent Consolidation Loan of 1922".

Equatorial Navigation v. Lloyd Brasileiro, N. Y. L. J. May 12, 1952, p. 1893: tort action between Panamanian corporation and Brazilian government agency based upon occurrence in Brazil.

Ellimar Societe Anonyme of Casablanca v. United States, 106 F. Supp. 191 (Court of Claims): requisition of property of Moroccan corporation by U.S. Army; award by French Commission under Byrnes-Blum Agreement of May 26, 1946.

Feller v. McGrath, 106 F. Supp. 147 (D. C. Pa.): cloaking transaction of 1939 to protect German-owned shares in American corporation from seizure in event of war.

E. M. Fleischmann Lumber Co. v. Resources Corp. International, 105 F. Supp. 681 (D. C. Delaware): misrepresentation of claims of Indian Communities with respect to timber purchased in Mexico; execution of contract in Mexico City.

Fukumoto v. Acheson, 105 F. Supp. 1 (D. C. Hawaii): forfeiture of U.S. nationality by Japanese-American who recovered Japanese nationality in 1943.

Galtrof v. J. G. Farbenindustrie Aktiengesellschaft, N. Y. L. J. November 18, 1952, p. 1195: failure to enforce levy under 1941 attachment of New York assets of German debtor.

Gantner v. Gantner, 38 Adv. Cal. Rep. 754, 246 P. 2d 923 (S. Ct. Cal.): permission to a divorced parent to take children into foreign country, although California court may lose jurisdiction over children.

Gattegno, Estate of Albert D., N. Y. L. J. October 16, 1952, p. 830: *envoi en possession* under French law; compliance with foreign tax regulations.

Gehring, Matter of Adolph, N. Y. L. J. April 3, 1952, p. 1340: attorney in fact appointed by committee of German absentee missing in Poland.

Goldman v. Mulligan, N. Y. L. J. October 20, 1952, p. 866: application of Italian law as law of domicile of Yugoslavian testator.

Gonzoles v. United States, 106 F. Supp. 180 (Court of Claims): Filipinos' claim for requisition of material by recognized Philippine guerilla squadron in the Philippines during Japanese occupation.

Goodwin v. Townsend, 197 F. 2d 970 (C. A. 3): Canadian statute of limita-

tion (Ontario Highway Traffic Act of 1938) does not preclude maintenance of Pennsylvania action for automobile accident, since forum applies own procedural law.

Gordon Woodroffe Corp. v. United States, 104 F. Supp. 984 (Court of Claims): no authority of special assistant to Co-ordinator for Aid to Greece and Turkey to purchase generator for Athens Piraeus Electricity Company.

Greene v. United States, 106 F. Supp. 682 (D. C. N. Y.): salvage of cargo of Lend-Lease goods for Union of Soviet Socialist Republic from Liberty ship Thomas G. Masaryk torpedoed in 1944 near Gibraltar, Spain.

Grisbako, Estate of Theresa, N. Y. L. J. March 10, 1952, p. 958: objections of Hungarian Consul General against deposit in city treasury of distributive share of Hungarian national.

Grossman v. Western Financial Corp., N. Y. L. J. July 1, 1952 p. 5 col. 7 (App. Div.): illegality of contracts to be procured from manufacturers of jute bags in Germany; pleading of foreign (German) laws.

Grundstein v. Suburban Motor Freight, 107 N.E. 2d 366 (C. A. Ohio, Franklin County): term "duration of the present war" in a lease agreement.

Gualco v. Acheson, 106 F. Supp. 760 (D. C. Cal.): retention of American citizenship of minor born in United States who under Italian law derived Italian citizenship from parents prior to their naturalization.

Guinness v. State of Washington, 246 P. 2d 433 (Sup. Ct. Washington): inheritance tax on yacht "Fantome" moored at Seattle for several years by British owner.

A. Gusmer, Inc. v. McGrath, 196 F. 2d 860 (C. A. Col.): recovery of income taxes for royalties due to German corporation for time prior to vesting of its assets by Alien Property Custodian.

Harding v. Pennsylvania Mut. Life Ins. Co., 90 A 2d 589 (Super. Ct. Pa.): term "war" in double indemnity exclusion clause not applicable to railroad accident during military training because insurer failed to prove that term applied also to undeclared war (Korea).

Harvard Trust Company, Trustee v. McGranery, 1952 Advance Sheets 625 (Sup. Judicial, Ct. Massachusetts): question of distribution of shares of trust to German beneficiaries who were unable to take personally.

Hirsch, Matter of Solomon H., N. Y. L. J. August 26, 1952, p. 314: deposit of shares of Roumanian residents with Treasurer of the City of New York; sec. 269 Surrogate's Court Act.

Holtorf, Estate of Henry F., N. Y. L. J. November 24, 1952, p. 1259: exercise of power of appointment by donor resident in New York to be determined by New York law despite donee's residence in Germany at her death.

Iafrate v. Compagnie Generale Transatlantique, 106 F. Supp. 619 (D. C. N. Y.): recovery for wrongful death on high seas on S.S. Liberty; proper pleading of foreign (French) law.

International Silk Guild, Inc. v. McGrath, 105 F. Supp. 766 (D. C. Col.): debt claim against vested funds of the Asahi Silk Company, a Japanese corporation.

Japan Central Exchange & Indemnity Ins. Co. of North America v. Pillsbury, 106 F. Supp. 727 (D. C. Cal.): compensation award for death from dysentery when employed as civilian warehouseman in Japan.

Johansson v. O. F. Ahlmark & Co., 107 F. Supp. 70 (D. C. N. Y.): inapplicability of Jones Act (46 U.S. C. A. sec. 688) to suit by Swedish seaman who signed articles in Sweden to serve on Swedish vessel; compensation under Swedish law.

Jost v. Acheson, 104 F. Supp. 41 (D. C. N. Y.): expatriation of native-born citizen of U. S. by oath of allegiance to Adolf Hitler and the German Reich.

Kanbara v. Acheson, 103 F. Supp. 565 (D. C. Cal.): no loss of citizenship by instructing in 1943 in school in Japan

and by forced service in Japanese Army in 1945.

Kawakita v. United States, 343 U. S. 717, 72 S. Ct. 950: dual national convicted of treason for treatment of American prisoners of war in Japan.

Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America, 73 S. Ct. 143: prelate appointed by Moscow ecclesiastical authorities of Russian Orthodox Church authorized to use and occupancy of New York Church.

Kent Jewelry Corp. v. Kiefer, N. Y. L. J. November 12, 1952, p. 1126: unlicensed assignment in Germany of rights to an American patent; application of Military Law 53 on Foreign Exchange Control.

Kudlich, Matter of Anna K., N. Y. L. J. January 4, 1952, p. 5: deposit of residuary legacies of Hungarian nationals in city treasury.

Krebs, Matter of Peter K., N. Y. L. J. November 6, 1952, p. 1078: recognition of common law marriage in Hungary.

Leshin v. Ludwig, 111 NYS 2d 105: recognition of ceremonial marriage performed by rabbi in Vienna, Austria.

Lewis v. Knappen Tippetts Abbett Engineering Co., 304 N. Y. 461, 108 N. E. 2d 609: death by Arabs of engineer on a sightseeing trip to Jerusalem as "in course of employment" within the meaning of N. Y. Workmen's Compensation Act.

Liechti v. Roehe, 198 F. 2d 174 (C. A. 5): recovery for automobile collision under Panamanian law.

Lo Dolce, In re, 106 F. Supp. 455 (D. C. W. D. (Buffalo) N. Y.): extradition sought by Italian authorities of American army officer for alleged crime which occurred in Italian territory at the time occupied by German army.

Mandoli v. Acheson, 73 S. Ct. 135: acquisition by U. S. citizen by birth of dual (Italian) citizenship under Italian law.

Marcos v. United States, 106 F. Supp. 172 (Court of Claims): requisition of cattle in the Philippines before outbreak of war; statute of limitations.

Mastrocola v. Acheson, 105 F. Supp. 580 (D. C. N. Y.): acquisition of dual (Italian) citizenship.

Mazza v. Acheson, 104 F. Supp. 157 (D. C. Cal.): election of retention of American citizenship by dual (Italian) national.

Mayer, Matter of M. (Kapell, dec'd), N. Y. L. J. December 2, 1952, p. 1344: construction of will under German law.

Maple Island Farm, Inc. v. Bitterling, 196 F. 2d 55 (C. A. 8): no permanent foreign residence by employment with American firm in Venezuela.

Miller In re M. Will, 115 N. Y. S. 2d 255: residents of Russian Zone of Germany as beneficiaries of testamentary trust.

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Molo, In re, 107 F. Supp. 137 (D. C. N. Y.): Iranian citizen as "neutral" under Selective Training and Service Act.

Monaco v. Acheson, 105 F. Supp. 739 (D. C. N. Y.): allegiance to Italy during Italian Army service.

Nagy, Estate of Amelia von N., N. Y. L. J. October 16, 1952, p. 830: legacies payable to residents of Czechoslovakia.

Naito v. Acheson, 106 F. Supp. 770 (D. C. Cal.): dual citizenship of native born national of Japanese ancestry in 1921 prior to 1924 amendment to Japanese law.

Naval Government of Guam v. 11,825,263 Square Meters, 102 F. Supp. 427 (D. C. Guam): just compensation for condemned land.

Niggol, Matter of N., 202 Misc. 290 (Surr. Suffolk County, N. Y.): distribution of funds to nonresident Estonian nationals.

Nixdorf, Matter of Ida N., dec'd, N. Y. L. J. August 7, 1952, p. 214: legatee residing in Russian Zone of Germany.

North American Continental Co., Inc. v.

The El Cuis, 107 F. Supp. 436 (D. C. N. Y.): foreign government agency (Banco de Credito Industrial Argentino) as intervening mortgagee in libel action.

N. V. Montan Export-Metaal Handel-Maatschappij v. United States, 102 F. Supp. 1010 (Court of Claims): seizure of patent of Hungarian national; assignment to Dutch corporation with domicile in Willemstad, Curacao.

Olsen, Matter of Christian, N. Y. L. J. February 28, 1952, p. 811: proof of heirship under Norwegian law.

People on Complaint of Howley v. Von Otter, 114 N. Y. S. 2d 295: immunity for wife of counselor of Swedish Delegation to United Nations from prosecution for violation of parking provisions of New Rochelle, N. Y., traffic code.

Perri v. Acheson, 105 F. Supp. 434 (D. C. New Jersey): service in Italian army and voting in Italian elections.

Peters v. McKay, 246 P. 2d 585 (S. C. Oregon): rights of Dutch heirs to refund of proceeds of escheated estate.

Podkowik, In re P. Estate, 114 N. Y. S. 2d 710: citation to absentees last heard of in Lithuania in 1939.

Republic of China v. Pang-Tsu Mow, 105 F. Supp. 411 (D. C. Col.): counterclaims against sovereign state; 116 N. Y. S. 2d 660: personal service of process on director of purchasing office.

Reyes v. Egidi, N. Y. L. J. October 23, 1952, p. 919: immunity of Italian commercial attache.

Rivera v. Isbrandtsen Co., Inc. 112 N. Y. S. 2d 470: warning of seamen in Hongkong on dangerous zone of Shanghai port in Nationalist hands.

Rogers, Ex parte, 104 F. Supp. 393 (D. C. Guam): enforcement of immigration laws in Guam against Australian citizen.

Rosenzweig v. Statni Banka Ceskoslovenska, N. Y. L. J. November 10, 1952, p. 1108: examination before trial of administratrix of decedent's estate.

Sang Ryup Park v. Barber, 107 F. Supp. 603 and 605 (D. C. Cal.): Korean national allegedly subject to physical persecution if deported to South Korea; contrary finding not authorized by letter from Korean Ambassador to the United States.

Scavone v. Acheson, 103 F. Supp. 59 (D. C. N. Y.): loss of U. S. citizenship by voting in local Italian elections in March, 1946.

Sanchez v. Pan American World Airways, Inc., 107 F. Supp. 519 (D. C. Puerto Rico): rights arising out of airplane accident under Death on the High Seas Act 1920.

Schreiber, Matter of Abraham, N. Y. L. J. April 30, 1952, p. 1732: declaration of death of residents of Plock, Poland.

Segreti v. Acheson, 195 F. 2d 205 (C. A. Col.): failure of Italian citizen to make timely assertion of American citizenship.

State of rel. Kosakewich v. Dame, 249 P. 2d 156 (S. Ct. Wyoming): Canadian citizen not entitled to pharmacist's license under reciprocal arrangements with New Mexico which does not require citizenship for license.

State of Washington v. Nakamura, (Super. Court Wash. Lewis County, No. 22039, October 15, 1952): state courts without jurisdiction to determine matters relating to Japanese property vested by Alien Property Custodian.

St. Paul Fire & Marine Ins. Co. v. The Republica de Venezuela, 105 F. Supp. 272 (D. C. N. Y.); retention of jurisdiction for action for cargo damage by Minnesota corporation, subrogee of shipper, against Colombian corporation owner of ship under Venezuelan flag.

Sternfeld, Estate of Helene, N. Y. L. J. June 26, 1952, p. 2507: distributive shares of absentee residents of Poland.

Szeben, Estate of Elizabeth, N. Y. L. J. February 7, 1952, p. 529: statute of limitations in discovery proceedings; decedent, a resident of Hungary, died there in 1945.

Tan v. United States, 102 F. Supp. 552 (Court of Claims): suspension of statute of limitations for claims

arising in Philippines until Japanese surrender (September 2, 1945).

Toeg v. Margolies, 280 App. Div. 319, 113 N. Y. S. 2d 373: seizure of hosiery by French Government for lack of necessary import license.

Trudell v. Gagne, 1952 Advance Sheets 297 (Sup. Judicial Court Mass.): application of law of Quebec to intestate's death in automobile accident.

Tselentis v. Michalinos Maritime & Commercial Co., Ltd., 104 F. Supp. 942 (D. C. N. Y.): recovery for unpaid wages of Greek national as seaman aboard vessel of Greek registry (Leonidas Michalos) against Greek corporation.

United States v. Bayer Co., Inc. (New York), 105 F. Supp. 955 (D. C. N. Y.): effect of consent decree under Sherman Anti-Trust Act on exclusive sales rights in Cuba.

United States v. Caltex (Philippines), Inc., 21 U.S. Law Week 4054: no compensation for destruction of terminal facilities in Philippines after Japanese invasion.

United States ex rel. Camezon v. District Director of Immigration & Naturalization at Port of New York, 105 F. Supp 32 (D. C. N. Y.): status of Spanish national as excluded alien.

United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (D. C. N. Y.): antitrust proceedings against United States and British corporations, jointly owners of Chilean and Brazilian companies.

United States v. One North American Airplane, 197 F. 2d 635 (C. A. 3): exportation of airplane without license in violation of Neutrality Act of 1939.

United States Trust Company of New York, Matter of the Accounting of the Estate of Eugene Higgins, Deceased, 304 N. Y. 686 and 688: obligation, under English law, of testator with residence in Paris, France, for extraordinary services of employment.

Universal Shoe Corp. v. Exico Co., Ltd., N. Y. L. J. October 24, 1952, p. 934: indemnity with respect to anti-dumping proceedings against Czechoslovakian corporation.

Victorio v. United States, 106 F. Supp. 182 (Court of Claims): requisition of cattle by Philippine guerilla unit during Japanese occupation (Hunters ROTC Guerillas of Luzon), as element of Philippine army serving with American armed forces, constitutes basis for claim against United States.

Wakarecy, Matter of Frank W., dec'd, N. Y. L. J. August 7, 1952, p. 214: distribution of residuary estate to residents of American Sector of Berlin, Germany.

Walg, Matter of Harry W., dec'd, N. Y. L. J. August 26, p. 315: residence of Netherlands national killed in airplane accident in California after arrival from Venezuela.

Warner v. Spindel, N. Y. L. J. November 12, 1952, p. 1128: computation of German "blocked" Deutschmarks for damages for breach of contract.

Waterman's Estate v. Commissioner of Internal Revenue, 195 F. 2d 244 (C. A. 2): "realization" in 1945 of value in dollars of blocked sterling account in London bank.

Weiss v. Isbrandtsen S.S. Co., 12 F. R. D. 256 (D. C. N. Y.): inability of discovery of facts by reason of military action in Korea.

Werkley v. Koninglijke Luchtvaart Maatschappij N. V., 1952 U.S. and Canadian Aviation Reports 1 (D. C. N. Y.): workmen's compensation claim; survival of right of action for accident of a Dutch air transport occurring in India.

Werth, Matter of Estate of R. E. Werth, (D. C. State of Montana, Flathead County, No. 3558, September 3, 1952): determination of identity of alleged foreign (German) heirs; effect of appearances of Alien Property Custodian.

Zacoum, In re Z. Estate, Petition of Mango, 115 N. Y. S. 2d 42: services of English barrister in Istanbul, Turkey.

Zoch, Estate of Max Z., N. Y. L. J. June 17, 1952, p. 2398: distributive shares of residents within the Russian Zone of Germany.

Book Reviews

DE GROOT, H. *Inleidinge tot de Hollandsche Rechts-Geleerdheid*. Dovring, F.; Fischer, H. F. W. D.; Meijers, E. M., eds. Preface in Dutch and English. Leiden: Universitaire Pers Leiden, 1952. Pp. xxx, 400.

To comparative legal history, the law of the Netherlands is of special interest as a fusion of classic Roman law with Germanic customs. In this process, which reached its apogee in the extraordinary cultural renaissance that during the seventeenth century followed the assertion of independence by the Netherlands, the classical formulation of Roman-Dutch law by Grotius in the *Inleidinge*, the first such treatise to appear in the vernacular, is outstanding in the rich Dutch legal literature of the period. It is historically comparable in significance for the Dutch law of the 17th and 18th centuries (which, though superseded in the homeland, is still the basis of the laws of South Africa and Ceylon) to that of the *De Jure Belli ac Pacis* for the law of nations.

The *Inleidinge* was written during Grotius' incarceration in Loewenstein (1619–1621) and first published in 1631. Previously to the present edition, there were twenty-eight impressions in Dutch and five English translations, as well as commentaries since 1644 by various authors. The present new edition, described by the publishers as a second edition, includes for the first time the additions and notes written by Grotius in 1639 in a copy of the 1636 edition, which was found by Folke Dovring at Lund in 1948. Accounts of this interesting discovery were published by the editors in the *Mededelingen van de Koninklijke Nederlandsche Academie van Wetenschappen*.[1]

Here for the first time is provided a text of this classic work, rendered on the basis of a collation of earlier editions, with indication of the variations, so as to reproduce Grotius' original intention as accurately as possible. The value of this edition as a reproduction of Grotius' contributions to Roman-Dutch law is enhanced by comprehensive references to Grotius' other works and appendices, the two most important of which reproduce the five synoptic tables of the work prepared by Grotius himself and an extensive digest of his legal opinions. This consequently may be regarded, for the time being at least, as a definitive edition.

La Pensée politique et constitutionnelle de Montesquieu. Bicentenaire de l'Ésprit des Lois, 1748–1948. VIII. Travaux et Recherches de l'Institut de Droit Comparé de l'Université de Paris. Paris: Recueil Sirey (1952). Pp. 7, 328, with table of contents.

Of the contributions made by French jurists to the constitutional and legal presuppositions of Western culture, two are paramount. In the first of these, the *Six Livres de la République*, Jean Bodin in 1576[2] formulated the basic premise

[1] Afdeling Letterkunde, n.s., vols. 12, No. 3 and 13, No. 10.

[2] As the late M. le Bâtonnier Gardot notes, this is the correct date of the first edition of Bodin's chief work—"et non de 1577 comme on le dit dans une erreur commune" (p. 42).

of the modern national state—the principle of sovereignty. The second, *l'Ésprit des Lois*, published anonymously by Montesquieu in Geneva in 1748 after twenty years of preparation, is not only the source of the doctrine of separation of powers but also the precursor of modern political science, sociology, and penology. Bodin lived in an era of anarchy and therefore presented sovereignty subject to fundamental laws as the essential principle of "right" government, necessary to maintain peace. Montesquieu, writing under the becalmed shadows of absolute monarchy, proposed to escape despotism by a system of checks and balances, forming the conditions of liberty. The conceptions of government under law and individual freedom, as developed in these essentially scientific treatises, the products of considerable experience in affairs and extensive comparative research, still surmount the stream of later romantic ideologies unleashed by such as Rousseau and Nietzsche, and their totalitarian epiphenomena.

In this perspective, it was a genial inspiration to celebrate the 200th anniversary of the publication of Montesquieu's classic work and, in particular, to provide in this illuminating volume, reproducing the conferences held at the Institute of Comparative Law in Paris in 1948–49, an account of the scientific heritage therein bestowed to posterity. The many facets of this heritage are surveyed in two preliminary essays, concerning its relations to political science and to public law, by Professor Mirkine-Guetzévitch and Conseiller Henry Puget, respectively, who were in charge of the program.

The program, as here published, gives a fascinating review of Montesquieu's career, conceptions, and achievements, the more valuable as it reflects the views of a number of distinguished scholars. It is divided into three parts, the first devoted to the background and general character of *l'Ésprit des Lois*: its relation to Bodin's République (Gardot); the preparation and publication of the work and its eventual censure at Rome and in Paris (Brèthe de la Gressaye); and its humanism, postulating the autonomous dignity of the individual, which mediates between the two poles of medieval thought, supernatural asceticism and terrestrial feudalism, the one sacrificing vital existence to hopes of paradise and the other intercalating humanity as static figures in a landed hierarchy (Barrière). The first of these papers, presenting a scholarly comparison of *l'Ésprit des Lois* with Bodin's treatise, suggests the extent to which Montesquieu perhaps may have utilized this source; it recalls Baudrillart's remark that Montesquieu would report his borrowings with an air of discovery, while Bodin concealed invention under an air of antiquity (p. 66).

The second part, covering the doctrines, tendencies, and consequences of *l'Ésprit des Lois*, contains: a concise essay on Montesquieu's dual classification of forms of government into those that are and those that are not dedicated to liberty (Prélot); a penetrating analysis of Montesquieu's constitutional conceptions (Eisenmann); a documented account of the history of the principle of separation of powers during the Revolution (Mirkine-Guetzévitch); a brief indication of the influence of Montesquieu's work on the Rights of Man

(Cassin); an evaluation of its contribution to history (Rain); a magistral analysis of its influence in the humanization of criminal law (Graven); and a discourse on its significance for comparative law (Niboyet). The third and concluding part of the volume contains an entertaining review of Montesquieu's relations with England (Puget) and a briefer estimate of the reception of his ideas in the United States (Bastid).

Among such a range of topics, it would be embarrassing to choose. Without doing so, two may justifiably be noted as of unusual interest. The one is Professor Eisenmann's important demonstration that the dogma of the separation of powers as attributed to Montesquieu in modern times—indeed, since the beginning of the 19th century—has been a caricature of his conception as understood by his contemporaries. In the current stereotype, separation of power means three *separate* organs of government—legislative, executive, and judicial—each absolutely distinct in personnel and function, each exclusively exercising the totality of the corresponding powers. Instead of this rigid, impractical construction, it is shown that Montesquieu's system rests upon two fundamentally different postulates: first, that the three powers and their organs, or any two of them, should not *completely* coalesce; second, that the sovereign power—the legislative—should be composite, combining different political elements. Indeed, the idea that undue concentration of power in a single person or a unitary assembly is a sure source of that despotism which Montesquieu abhorred, is the central point in his doctrine. In this light, much of the criticism to which it has been submitted obviously evaporates.

Of no less interest is Professor Graven's analysis of the impact of Montesquieu's criterion of political liberty upon the penal law and criminal procedure of his times. Indeed, this was the focal light in the Age of Enlightenment, pointing the way to our modern conceptions of crime and punishment. The necessity of clear and detailed statement of the law so that no one shall incur penalties unawares (*nulla poena sine lege*); separation of secular from spiritual offences to prevent the horrible dangers exhibited in the history of such crimes as witchcraft, heresy, and treason; avoidance of excessive sanctions, which defeat their ends; substitution of public accusation and a public trial before a jury of one's peers for secret inquisitions and irrational proof by question and confession on the rack,—these modern conceptions of criminal justice as developed by Montesquieu (would that they were not still too often violated) led Voltaire to describe his work as the "Code of Reason and of Liberty," while Beccaria, the father of modern penology, acknowledged that he had but followed in "the luminous steps" of the immortal Montesquieu.

Prolem sine matre creatam, so Montesquieu prefaced his work, which, utopian in its habitat, turned to an idealized English constitution to vindicate conceptions of liberty and justice that have since become common property. It is fitting to commemorate this achievement, and the present volume does so with the elegance and eloquence inspired by such occasions in France. *Prodeant celebrationes gallicae.*

HESSEL E. YNTEMA

Le Droit Privé Français au Milieu du XX^e Siècle. Études offertes à Georges Ripert. Paris. Librairie Générale de Droit et de Jurisprudence, 1950. Vol. I, pp. xxxv, 554; Vol. II, pp. 481.

The world's humanities and sciences look to the Nobel prizes for recognition of outstanding achievement, and other activities have their respective modes of bestowing deserved honors. In the field of legal scholarship, there is the publication of a book of creative contributions to legal literature. These two volumes of essays in honor of Georges Ripert contain fifty-four original studies tendered by his colleagues, the law professors of France. The significance of this well-deserved recognition and honor is even further enhanced by the theme of the compilation. Georges Ripert always considered law as a vital force among men, living and moving with the people whose needs it served—it is very appropriate that the articles constitute an appraisal of the development of French private law at the middle of the current century.

Georges Ripert has been known best as professor of law at the Univeristy of Paris, where he served from 1918 to 1949, including a period as its dean. His particular interests have been in civil law, commercial law, and maritime law. In deference to the honoree, these are the subjects covered by the materials which are grouped into five categories: general studies (16 articles), the family (11 articles), property (5 articles), contracts and obligations (10 articles), and economics (12 articles). Outside of France, Professor Ripert has been recognized very widely as an authority on French civil law, first for his collaboration with his older colleague the renowned Professor Marcel Planiol, and then for his further accomplishments in that field from the point where Planiol left off. The earlier editions of Planiol's elementary treatise (3 volumes) on French civil law, and the collaborative editions by Planiol and Ripert, are now followed by the Ripert editions of the same work; this has been one of the most widely used civil law works of all time, and throughout the world as well as in France. The other original writings and editorial works of Professor Ripert make a list of several pages and are too numerous to enumerate or to describe in detail here. Similarly, the celebration essays are so numerous and so significant that only a small sampling can be indicated.

The first article is by the grand old man of the French legal fraternity, François Gény.[1] In writing about the contemporary evolution of juridical thought in French doctrine,[2] he draws from his own experience and observation during seventy-five years in the law. His recollections and personal reactions trace the highlights and the direction of the developments which have taken place in the legal system of France. The earlier doctrinal approach of strict

[1] L'évolution contemporaine de la pensée juridique dans la doctrine française (vol. I, p. 3).

[2] In France, the "doctrinal" writings of recognized legal scholars are accorded great respect and weight in the courtroom as well as in the classroom. A great deal of the legal development emanates from this doctrine which is studied and cited more intensively and extensively than court decisions.

literal interpretation of the written law was narrow and sterile; it yielded gradually to expanding juridical concepts in order to keep pace with new ideas and the realities of a modernizing way of life. In this stream there also emerged Gény's own work[3] on the method of interpretation and the sources of positive private law about which he modestly makes only a minimum mention. Faithful to the occasion, Gény sings the praises of Professor Ripert's work, which he characterizes as combining reliable historical precedents and justifiable economic elements, with clarification through comparative studies, to reach the most practical solutions in the interpretation of the written law. In the fulfillment of this process, Gény recognizes natural law as a source of law superior to the individual or collective will of man (legislation). On such a broad base, the development of French juridical thought could carry on through the disturbances of two world wars and continue to make great progress.

The theoretical basis of law is more fully developed in a series of articles which show a cross-section of French thought in the philosophy of law. Nor is it surprising that authors whose ideas are quite different find them reflected in the works of Georges Ripert.[4] One of these articles is by Paul Roubier,[5] who sees law in an intermediate position between sociology and morality. The spontaneous relationships in societal groups cannot constitute a satisfactory pattern for a legal system, yet on the other hand a legal system cannot attain the perfection of a moral order because of man's own limits in his social relations. The juridical order is accordingly derived from sources which are both formal and informal. The formal sources are legislation and jurisprudence (court decisions), both of which are based on political authority. The informal sources are the practical experiences which have produced satisfactory results, and the doctrinal discussions of the jurists which are based on reason and which reach up toward an ideal of justice.

The group of general studies also includes essays discussing the adjustments of French private law to the machine age and to the corporate device in business practice, as well as to the general economic order and to collective interest. Two essays are devoted to civil procedure, and the same number to human rights including genocide and the universal declaration of the rights of man. In the field of conflict of laws there is one article on jurisdiction,[6] and it was a regrettable oversight to omit from the table of contents of Volume I the excel-

[3] La méthode d'interprétation et les sources en droit privé positif (1 ed. 1899).

[4] Ripert as spokesman of the modern psychological school is described by Roubier (vol. I, at 26-27) as having formally repudiated the old doctrine of "natural law;" instead, the foundation of juridical idealism can be based on traditional moral standards and a consciousness of justice. This is in contrast to Gény's (vol. I, 5, 7) strong implication that his high regard for Ripert's work is due to Ripert's recognition of "natural law" as the superior source of law in the juridical order.

[5] L'ordre juridique et la théorie des sources du droit (vol. I, 9).

[6] Pierre Louis-Lucas, Le développement de la compétence du droit français dans le règlement des conflits de lois (vol. I 271).

lent essay by Professor Batiffol on conflict of laws in space and conflict of laws in time.[7]

The essays in the field of Family Law cover a wide range of topics including marriage and divorce, legitimation, property regimes, and social security. In many of these areas, there has been considerable evolution during the past half century, but despite the disturbing statistics on divorce and the increasing liberty of the individual, the French institution of the family continues to be the essential and serious basis of society. Along with legal liberty, each individual has a moral responsibility by virtue of which the family preserves the stability to transcend passing disruptive currents. The same reassuring thought can be expressed about other countries as well, even closer to home.

A collateral problem of the family in France has been the monetary instability as a result of changes in value due to inflation. Apart from the payment of old debts in new currency, so to speak, there are several kinds of legal complications in relation to the effective date for the calculation of successions, partitions, reduction of gifts, forced portions, and so forth.

A very striking article in the Property group is the one by G. Morin,[8] wherein the author evaluates the significance of the contemporary evolution of the right of property ownership.[9] At the time of the French codification, the absolute and exclusive right of ownership in private property constituted one of the basic accomplishments of the Revolution, and was duly incorporated into the Civil Code of 1804. The unitary concept of ownership was the reaction against the divided domain of feudalism under which eminent domain was vested in the state, direct domain in the feudal lord, and the useful domain in the vassal. This medieval concept was replaced with the Roman concept of *dominium* or absolute and exclusive rights of ownership in one person—naturally the person who was in productive possession.

During recent years there have been quite a number of deliberate and direct attacks against this civil code concept of absolute and exclusive private property rights. One area in which this is particularly pronounced is in the contracts of lease—commercial, rural, and residential. In all three categories, the existing legislation provides for the involuntary continuation of the lease and the fixing of the rent, so that the lessee has for practical purposes the equivalent of a real right or a share in the rights of ownership. To evict a tenant from commercial property, the owner must indemnify him for all damages attributable to lack of renewal of the lease; even if the owner desires to occupy the premises himself, he must still pay for all enhanced values effected by the tenant. To evict a farm tenant, the owner must not only show that he or his family will occupy the property but also that they will productively cultivate it for at least nine years. To evict a residential tenant is well-nigh impossible because even if the owner needs the premises for himself and his family, he

[7] Conflits des lois dans l'espace et conflits des lois dans le temps (vol. I, 292).

[8] Le sens de l'évolution contemporaine du droit de propriété (vol. II, 3).

[9] The French word "*propriété*" is sometimes translated as "property" and in other contexts as "ownership."

must first procure another lodging for the present tenant. The author sees in this process a return to the divided domain of feudalism. However, he does not observe that it is the social policy of the Revolution which is still dominant, namely, the consolidation of the productive possessor—in a country of small industries and small shopkeepers and a critical housing shortage.[10]

Another vivid illustration of the successful bombardment of the civil code unitary concept of ownership is in the industrial and commercial fields. Besides the trade union development itself, there are the *comités d'entreprise*, required by law in all kinds of activities. These consist of representatives of both management and labor; they have access to all records and accounts, and they participate in the making of administrative decisions including the conditions of work and the distribution of profits. In essence, there is a dismemberment of capitalist ownership in a movement toward the kind of collaboration with labor which would constitute a real division of the fundamental rights of ownership under appropriate statutory regulation.

It is also noted that the attempts to incorporate in the new 1946 constitution an old standard kind of definition of property-ownership[11] provoked such controversial discussion that the item was omitted altogether.

In view of these developments, together with others such as nationalization, the author (G. Morin) is led to conclude that the predominance hitherto accorded to acquired personal property (*la richesse acquise*) is yielding to the new rights of all men, the right to life (*droit à la vie*) and right of work (*droit du travail*). This new movement of readjustment of power, in public law as well as private law, marks the decadence of the Roman idea of sovereignty and their absolute concept of property-ownership. In all of this, the author sees an historical fact of the very greatest magnitude—the downfall of the Latin juridical order!

One may or may not agree with this interpretation of the evolution in the field of property-ownership; the legislation and practices are both realities, and the significance suggested is intellectually provocative.[12]

A somewhat different slant in the explanation of the French property law

[10] Emergency rent controls started in France with the First World War, and had to be renewed from year to year as housing conditions continued to be critical. In 1931, that legislation was still considered emergency and temporary, so that the nature of the tenant's right was not yet considered other than an ordinary personal right. *Cf.* Dainow, La Nature Juridique du Droit du Preneur à Bail dans la Loi Française et dans la Loi de Québec (Recueil Sirey, Paris, 1931).

[11] "La propriété est le droit inviolable d'user, de jouir et de disposer des biens garantis à chacun par la loi." [Translation—Ownership is the inviolable right to use, to enjoy and to dispose of things assured to each person by law.]

Cf. French Civil Code, Article 544: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements." [Translation—Ownership is the right to enjoy and to dispose of things in the most unlimited manner, provided one does not use them in any way prohibited by the laws or regulations.]

[12] *Cf.* Constantinoff, "French Law of Property and Its Proposed Revision," 26 Tulane Law Review (1952) 474, at 489.

developments is contained in an article under the descriptive title "From the utilization to the ownership of things" (René Thiery). Ownership dissociated from personal use has lost respect; deriving excessive benefits from the work of others is not looked upon with favor; absentee ownership will still occur, but deprived of power; a rich life of ease will be rare, if at all. Utilization is becoming both a condition to preserve rights of ownership and a basis to acquire rights—a closer and more personal relationship between property and people, between ownership and work. "Whether the occupant or the worker acquires the property right, whether the owner retains it or recovers it by living on his property or exploiting it, the result is the same: the most deserving person is the master of the thing."[13] "The necessity to keep direct contact with things reintroduces the human scale of values (*l'échelle humaine*) in a civilization menaced by bigness; insofar as possible, property will be divided among persons in accordance with the abilities and needs of each individual or more likely of each family."[14]

By whatever name such a state of affairs may be called, and by whatever social or legal theory it may be explained, it is apparent that a tremendous and far-reaching change is in process in the property law of France. It may be very significant for other countries as well to watch carefully its further development.

In the field of Contracts and Obligations, there has also been a movement of restriction. The article by Paul Esmein[15] recognizes the limitations that have been cutting down the scope of individual freedom of contract, especially in connection with labor and collective bargaining, price and ration controls, and leases of all kinds. However, despite his explanations in terms of theoretical analysis, the tightening control on private contract is still very real. This idea is more bluntly developed in an article by René Morel,[16] who documents the inevitability of more numerous "forced contracts" under the regime of a controlled national economy.

The penetration of government regulation in contracts of insurance has gone a long way in a short time. This began in order to protect the interests of the insured against the insurance company; while there has developed a wide system of financial controls by the government, the interest of the insured has always been foremost for the welfare of society as a whole.[17] Another kind of explanation finds, in the interference with private autonomy in insurance contracts, the imposition of respect for the moral law (*la loi morale*).[18]

The multiplication of restrictions on the civil code concept of private property, of forced provisions in private contracts, of controls and regulations in

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[13] Vol. II, 30.
[14] Vol. II, 24.
[15] L'obligation et la responsabilité contractuelles (vol. II, 101).
[16] Le contrat imposé (vol. II, 116).
[17] Maurice Picard, L'emprise de l'administration sur le contrat d'assurance (vol. II, 127).
[18] André Besson, Le contrat d'assurance et la morale (vol. II, 178).

commercial law, and so forth, may leave varied and uneasy impressions about the future of society and law in France. Whether it be called the eclipse of the individual or the resurgence of the group, the nemesis of capitalism or the ogre (or the angel) of socialism, the close of one era or the beginning of another, there is really no occasion to seek dramatic clichés which focus spotlights at special points while leaving the vast remainder in darkness. Thus, the startling statistics on divorce have not detracted from the institution of the family in France nor have they disturbed the basic stability of French society. Society and law are both always in flux; everything is just happening a little faster in the twentieth century than it did in the nineteenth.

One observation that comes to mind about all these essays in the numerous special fields of private law is that not a single mention is made of the French Civil Code Revision Commission, which has already completed six years of work. Such complete and systematic omission of reference to any of the draft provisions or published conference reports could only have been deliberate in the plans of those who sponsored and edited the publication. One must assume that there were good reasons for doing so, yet one cannot help wondering why such a significant operation is passed over in total silence.

Each article in these Ripert Celebration Essays has been prepared with an analytical and incisive description of legal developments in relation to the political and economic conditions of the whole French social order. They cover very numerous topics in addition to the ones here mentioned, including not only commercial and corporate law but also maritime, air, and labor law. Each author has condensed into his short essay a concentration of ideas which are both descriptive and critical; at the same time they are especially stimulating and provocative. In the latter areas lie what are probably the most useful values of this work to the foreign reader. As scholarly and realistic writings, these essays make a very significant contribution to legal literature and juridical thought; in so doing, they render great and deserving homage to their honoree, Georges Ripert.

JOSEPH DAINOW

VALLINDAS, P. G. Εισαγωγὴ εἰς τὸ συγκριτικον δίκαιον (*Introduction to Comparative Law*). Salonika: Sabba Gartagane, 1952. Student's Edition. Mimeographed. Pp. viii, 148.

Since the closing days of World War II, Greek legal scholarship has made important contributions in the field of historical jurisprudence and legal history.[1] The activation of the Civil Code on February 23, 1946, 111 years to a day after the issuance of a Royal Decree of King Otto which proclaimed and promised the preparation of a Code, stimulated considerable polemical

[1] See "Note on Recent Greek Work in Greek Legal History" by the present reviewer published in *Seminar*, the Annual Extraordinary Number of *The Jurist*, published by the School of Canon Law, The Catholic University of America, Vol. VI (1948) 77.

literature.[2] We now have an excellent little work, in Greek, by the Professor of Law of the University of Salonika, who has acquired an international reputation as an authority on conflict of laws.

Since the book is of an introductory nature, it almost necessarily follows the treatment of Professor Gutteridge, whom the author of course cites in his excellent bibliography (p. 62). In the first chapter (pp. 1–64), he discusses the notion of comparative law (pp. 1–7), which, he contends, is not a branch of law, but of jurisprudence. He traces its historical evolution from Antiquity, through the Middle Ages, to Modern Times, commencing with Grotius, Francis Bacon, and Selden (pp. 7–14). Continental writers mentioned include Leibnitz, Heinneccius, Montesquieu, Vico, Pothier, Savigny, Thibaut, Feuerbach, and Mittermaier (pp. 14–22). Bentham, Austin, Maine, Kent, and Story receive proper attention (pp. 22–24). He describes the origin of organizations in the various countries devoted to Comparative Law, commencing with the Société de Législation Comparée, founded in France in 1869, and of publications issued by them (pp. 25–27). He discusses the many Institutes of Comparative Law in France (p. 45 ff); in Germany (pp. 48–50); and in Italy, Belgium, Holland, Hungary, Sweden, and Norway (pp. 50–51). In treating the subject in England and the United States, the author refers to the work of Maine, the many laws in force in the British Empire, and to the task of the Judicial Committee of the Privy Council in applying a great number of laws, from India to Canada, or Muslim law to the law of African colonies (pp. 51, 52); he also shows great familiarity with the recent growth of interest in America in comparative law, as evidenced by the Restatements of the American Law Institute and the work of Committees on International and Foreign Law of the American Bar Association and the Association of American Law Schools (pp. 52–55). Reference is made to the work of Professor E. Rabel at the University of Michigan (p. 54).

In one of several passages about Greek law and Greek lawyers, the author describes the work of the Greek Institute of International and Foreign Law, which was created by statute in 1939. It is located in Athens, and performs services similar to those of the Foreign Law Section of the Library of Congress. The author has been its Director since its founding. It has to its credit a French translation of the Greek Civil Code (pp. 56–58). Since 1948, the Institute has published in French the quarterly *Revue Hellénique de Droit International*, of which the author is one of the two editors.

In Chapter 2 (pp. 65–130), the author discusses "The Objects of Comparative

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[2] For the story of the Greek codification see "The Greek Civil Code of 1946," by Professor P. Zepos, 28 Journal of Comparative Legislation and International Law, (3rd Series, 1946) 2. The Library of Congress has two pamphlets, in French, printed in 1940, "La Portée Sociale du Code Civil Hellénique" and "Le Code Civil Hellénique," which are speeches made by the Minister of Justice, and others, upon the occasion of the passage of the Introductory Statute (later suspended as a result of the German occupation) putting the Code into effect, as of July 1, 1941.

Law." He treats of the relation of comparative law to legal history, legal philosophy, and legal sociology under the heading of "Importance of Comparative Law in the Past" (pp. 62–74). Comparative research into the laws of different countries is a particularly valuable tool in the hands of a lawyer in international relations and in private international law (pp. 75–77) at the present time. There is another section on Greek Law—"Comparative Law in the Interpretation and Application of Existing Greek Law" (pp. 85–100); it covers the law before the Civil Code, the preparation of the Civil Code, and the influence of foreign laws on the Civil Code, chiefly the French, German, and Swiss Codes. A copy of the German Civil Code very nearly became the Greek Code in 1922 (p. 97), after the Greeks had abandoned the idea of copying the French Code. Consequently, comparative law is very useful for an understanding of the Greek Civil Code (p. 99); one should know both German jurisprudential and judicial interpretations of the German Civil Code, and, for a knowledge of Greek commercial law, one should know the French writings on French commercial law (p. 100).

The rest of Chapter 2 is devoted to the usefulness of comparative law in International Private and Political Transactions (pp. 100–107); for example, as a result of England's long supremacy in maritime matters, many legal forms and contracts in common international use are those prepared by British lawyers. There is a short account of the York-Antwerp Rules on average (pp. 104–106). The chapter ends with "The Importance of Comparative Law for the Future" (pp. 115–130). The author discusses "Comparative Law and Internal Legislation" (pp. 115–120); and "Comparative Law and International Uniform Laws" (pp. 120–130), including the Geneva Conventions and Anglo-American statutes on checks. There are some disadvantages to this tendency (pp. 127–130).

In the final chapter—"Families of Laws" (pp. 130–148)—the author discusses the importance of the division of laws and various proposed divisions (pp. 133–134). He makes his own division, viz., Primitive Peoples; Graeco Roman; Anglo-American; Moslem; Soviet; Jewish; Laws of the Far East; and Religious Laws (pp. 134–141). The final Section is "The Greek-Roman Family of Laws" (pp. 142–148). This family includes: first, the Latin laws, deriving from the French Napoleonic Code of 1804, viz., French, Italian, Spanish, Portuguese, Belgian, Dutch, and of the countries of Central and South America; second, the Germanic group of laws, viz., the German, Swiss, Austrian, and Scandinavian, of which the German and Swiss are outstanding, because their execution is scientifically complete, their codifications are relatively recent, and are more or less along the lines of the codes of other countries; and, third, the Greek law (pp. 145–148). Professor Vallindas contends that Greek law has a special legal tradition of some 3,000 years, and belongs neither in the Germanic nor in the Latin family of laws. It cannot be put in either category, because it was created long before the Germanic and French races originated. The three special families of laws—the Latin, the Germanic, and

the Greek—have many common characteristics, but the most important common characteristic is the common influence upon them of the Roman Law and the Greek Spirit.[3]

Greek lawyers are able to present to Anglo-American lawyers and those of Western Europe a point of view quite detached and quite significant. Their views, like their 1946 Civil Code, are influenced by both French and German legal concepts, and yet have originality. It is to be hoped that Professor Vallindas' useful little work can be translated into English or French, so that its circle of readers may be increased.

FRANKLIN F. RUSSELL

NADARAJA, T. *The Roman-Dutch Law of Fideicommissa.* Colombo: The Associated Newspapers of Ceylon, Ltd., 1949. Pp. xliii, 376.

To one interested in the comparative method of treating legal subject matter, this book offers real guidance. The background of the author, an advocate of the Supreme Court of Ceylon and sometime graduate student of Trinity Hall, Cambridge, England, qualifies him as expert both in Roman law and the civil law system and at the same time in the intricate case network of the common law. The development of the Roman fideicommissum originating in what Maitland termed the "singular horror of intestacy which always characterized the Roman," its reception in the Netherlands and, at a later stage, in South Africa and Ceylon, the territories of Roman-Dutch law, may be followed in this work, as it were, step by step through the elaborate citations ranging from the Institutes, the Digests, the treatises of Grotius, the Commentaries of Voet, and other writers, to contemporary decisions of the South African and Ceylon courts.

These citations furnish the historical background for the legal analysis of the institution of the fideicommissum and its complex constructions as fideicommissum *purum*, express, tacit, *in casum contrafactionis*, etc. The central topics of the volume are the interpretations of fiduciary acts and the various burdens inherent in fiduciary ownership. Although Roman-Dutch law is basically hostile to fideicommissary substitutions and in case of doubt substitutions are presumed to be direct rather than fideicommissary, the practice is not to press this presumption too hard, and in case of reasonable doubt the intentions of the testator govern. This is especially the tendency with regard to tacit fideicommissa, i.e. those in which the donor's intention is merely implied, as for instance in a proviso "*si sine liberis decesserit*," or in even more remote provisions that merely contain express prohibitions on alienation.

[3] Compare Vinogradoff, Outlines of Historical Jurisprudence, vol. 2, The Jurisprudence of the Greek City (1922) 12: ". . . Greek legal rules, instead of disappearing before the more strict and technical doctrines of Roman jurisprudence, came to modify the latter in many ways: the more we study Roman law, the larger is the share we have to assign to the influence of Greek custom and Greek legislation."

In dealing with the problem of co-extensive ownership, the author approaches the oft-discussed comparison between the fideicommissum and the common law trust. The chapter on "Fideicommissa and Trusts" contains a useful summary of cases in which the analogy of these two institutions has been considered in decisions, and also a good résumé of legislative and judicial adaptations of the trust in civil law countries. Although the author defends the customary assumption that there is no analogy between the fideicommissum and its contemporary derivations and the trust, his analysis together with the references cited throughout the whole treatise seem to point to the contrary.

VERA BOLGÁR

SHEPARD, P. *Sovereignty and State Owned Commercial Entities*. New York: Aberdeen Press, Inc., 1951. Pp. 155.

The international lawyer will be disappointed by the author's preponderant selection of Anglo-American sources;[1] he is discussing not so much international law, whether of the international tribunals or that more nebulous guide of foreign offices, as he is the interpretation of certain international legal doctrines by the American courts—so often beset by their own peculiar procedural and constitutional problems as to cast doubt upon the universality of their interpretations. The competence of a court to hear a case or to pronounce judgment under its own procedural rules and other conditions of the forum must be distinguished from the validity of its judgment, whether *per se* or as a precedent, in international law.

The author's stated purpose is to find a more modern and realistic concept of "sovereign immunity" for application by the courts in cases where a State has entered into commerce. "The implication of a waiver of sovereign immunity from the nature or purpose of the acts of State is too variable to be the basis of an invariant rule of law."[2] He is not seeking to "discover" law. Rather, having enunciated a doctrine he deems suitable, he demonstrates that its application would not be inconsistent with the present American practice.[3]

Whenever a State engages in commerce (or other acts whose traditional public character is doubtful) through a "separate entity," sovereign immunity is to be denied this entity in the courts of other States. The author, noting the difficulty of determining "public purpose" in a changing world, offers a rule which will permit the determination of a portion of the cases on what he considers a simpler factual question. "Where the sovereign activity is clearly within the classical category, the court will of its own accord recognize and grant the immunity. . . . However, if the activity is carried on by a State-owned entity, it is submitted, the court should take jurisdiction because the creation of the entity is to be considered an expression of the intent of the

[1] 180 cases of 210 cited.
[2] P. 99.
[3] P. 75.

State to consider the entity separate from itself; it is thus merely another legal personality."[4]

One may ask, however, if the finding of "separateness" could not be construed as most strikingly similar to that of "no public purpose." So it would seem unless we choose to apply purely formal criteria, considering a corporation, for example, "separate," and a "government purchasing commission," monopolizing State imports, not so. Such a formal approach, in its positive aspect, finds justification in the limited liability and other beneficial attributes of the corporate form; given those benefits, the State should assume the corresponding liabilities, such as amenity to suit.

A lack of clarity[5] in the author's views on the formal character of the rule proposed arises from his introduction of the apparently extraneous factor of "intention." "In the case of the employment of separate State-owned commercial entities, it is submitted that the separation of sovereignty is sufficiently clearly manifested to remove disputes involving these entities from the protection of sovereign immunity. . . . The use of separate entities by the State can only indicate an intent to separate the State. . . . Once the intention of a State to take itself out of the orbit of sovereignty is manifested, sovereign immunity should be disregarded and the State-owned entity be considered a mere legal personality."[6]

In the opinion of the reviewer, the author's suggestion has considerable merit, if the justiciable question is to be a formal "separateness," more facile and more proper for judicial determination than that of "public purpose;" "intention" is a provocative rationale, but in application it would seem most likely to provoke a continuation of current confusion.

What, though, of the other side of the coin—those cases, probably the majority, in which there is no "separateness"? Are we automatically to grant immunity or will we now apply the criterion of "public purpose"? The author states, speaking of commercial vessels, "If the vessel is owned and possessed by the State, the test of public service should not be applied, for *all activities of the State are inherently in the public service.*"[7]

Does he intend the implication that the only limitation on sovereign im-

[4] P. 59.

[5] The author's views on the relative participation of executive and judicial organs in the solution of the problems presented also seem inconsistent, and display some elements of considerable novelty: "(O)nce the court is convinced that the problem is one of international law, it should leave its determination to the executive branch if the latter wishes to commit itself. This process does not imply an inherent lack of competency in face of the international legal element, but a recognition of the political power of the executive branch in international relations." (p. 73). *Cf.* "Diplomatic intervention in such cases places upon the judiciary a burden, whether it is moral or political, which it should not bear. If after the court has made its determination, the case has sufficient significance for diplomatic intervention, it should be treated on diplomatic levels and not in derogation of legal rights enforceable in a court. The executive branch should not determine legal questions." (p. 59).

[6] Pp. 107–8; p. 67; p. 21.

[7] Pp. 109–110; italics supplied.

munity as applied to commercial activities of the State should be the "separateness" test he proposes? The doctrine of sovereign immunity, as applied today to State commercial ventures, is far extended beyond its origins. Its limitations have been slow in developing. Let us not derogate from those limitations already accepted, even by replacing them with a "simpler" (and perhaps narrower) formula. Let us instead welcome the author's suggestion as an *additional* basis for the nonapplication of an overextended and pernicious doctrine.

RICHARD P. BRAY, JR.

MATHEWS, R. E. *Labor Laws: Cases and Materials*, vols. I and II. Boston: Little, Brown and Company, 1951. Pp. xxxviii, iv, 893.

Although the readers of this Journal will be mainly interested in the comparative law aspect of this work, it is appropriate and necessary to say a word about its general character. There is no scarcity of American "cases and materials" books on labor law, and the reviewer confesses that, when he first opened the book, he did so with a good deal of scepticism. That scepticism derived not only from the knowledge that many American authors had already compiled labor law materials for the use of students, but also from the misgivings (sometimes almost reaching the point of despair) with which the reviewer and many of his European colleagues look upon the American type of legal literature introduced as "cases" or "cases and materials". Nobody doubts that it is right to induce the student to read primary sources, statutes, cases, committee reports, etc. We all try to do this, on both sides of the Atlantic. In a legal system as vast and as complex as that of the United States, a strong argument can perhaps be advanced for making the student's task easy by accumulating materials in handy volumes, although there is, from the pedagogic point of view, a serious doubt whether things are not made too easy for the student that way and, correspondingly, too difficult when he has ceased to be a student and become a practitioner. For what he misses through the "case book" method is the habit of handling the original volumes of statutes and reports. Having been brought up on case books, he may find himself all at sea when compelled to do his own research for the preparation of his own cases. However this is a matter which can be easily rectified by proper adjustments of law school curricula. What we European observers of the American legal scene consider to be a much more serious disadvantage of the case book method is its effect on the writer himself. The writer of a case and materials book, one feels, is constrained to go through a prolonged ordeal of self-abnegation and frustration. He has formed a picture of his subject in his own mind, he sees it within the framework of a systematic structure, he would like to present it in that framework and to offer his own views to the reader. But he may not. Instead of giving to the world the endproduct of his mental processes, he must lay into the shopwindow the raw materials or, at best, half-finished pieces to be assembled by the reader himself. In the field of labor law, for example,

there is, in the reviewer's submission, the most urgent need for a systematic treatise, and there are, to the writer's knowledge, a dozen or so men in the American law schools who could write it. But somehow they don't do it, and they continue to publish "cases and materials" instead. This is a loss to themselves and a loss to scholarship, and it makes the task of studying American labor law very difficult indeed from the point of view of the comparative lawyer.

The present volumes have the very great merit that, to a considerable extent, they smuggle the contraband of systematic presentation through the blockade which forces unknown (or only to be guessed) have established against textbooks. The "temporary" edition under review consists of four parts. The first part presents the social and economic problem of unionism and of collective bargaining, and the general impact of the law on these matters. The second part deals with the bargaining process itself (including the determination of bargaining agents and the duty to bargain collectively). There follows a third part describing the result of that process, i.e. the collective agreement and its legal effect. The concluding part analyses pathological situations: unfair labor practices, strikes, lockouts, picketing, boycott. This arrangement has great advantages, intrinsic as well as pedagogic. It avoids the pitfall of presenting labor law as a story of constant economic and legal struggles. It assists the student in overcoming one of the lawyer's occupational diseases, which is to regard the abnormal as the normal, and to plunge into pathology before having mastered the anatomy and the physiology of the law. This is achieved by the authors of these volumes by means of a judicious mixture of explanatory text and excerpts from cases and other sources, and also with the help of an imaginary practical case which they use as a theme with many variations, a paradigm of what happens in normal life rather than in the exceptional situations which reach the courts. One feels that a student who has gone through this book knows something about collective bargaining and also about the legislative problems with which it confronts a nontotalitarian society.

It is in relation to these legislative problems that Dr. A. Lenhoff's contributions are of the greatest value. These (all too brief) comparative essays deal with basic features of foreign labor law, i.e. with political backgrounds, and with some distinguishing elements such as labor courts, the relation of "imperative" statutes to freedom of contract, the difference between salaried employees and manual workers, with legally organised employee representation at plant and enterprise level, and with the impact of nationalisation on labor law. They further analyse matters such as civil service unionism, statutory machinery for fixing collective terms, the legal effect of collective agreements in general and with special reference to the "peace obligation," the Continental equivalents of complaints and grievance procedures, the problems of union security, company unions, and the general topic of concerted "hostile" action on either side. That Dr. Lenhoff was not in a position to give more than a

bird's eye view of these matters need hardly be said, and in fact it is astonishing how much detail and illustrative material he was able to compress in a few pages. But however much one may differ from him on many points of detail, it is clear that he has vindicated the claim of labor law to occupy a front rank position in comparative law as a whole.

That the comparison of standards of social protection, of matters such as safety and health legislation, hours of work, child employment, and social insurance, is a topic of the utmost practical significance, politically, economically, and legally, is a commonplace. The publications of the International Labor Office, and indeed the very existence of the International Labor Organisation and of its work, bear witness to this fact. It is not, however, universally recognised that comparative law has an equally important contribution to make in union recognition, collective bargaining, works councils, the law of labor disputes, and (a point not covered directly by the present volumes) internal trade union law, i.e. the relation between unions and their members. As so often happens in comparative law, the legislative problems are similar in many jurisdictions and the solutions less different than one might have expected. But the methods of solving the problems differ widely. This is not only due to different legal traditions (a point perhaps slightly overemphasised by Dr. Lenhoff) or legislative techniques. What is more fundamental is that matters which in one country are regulated by "law" are left to the self-adjusting processes of industrial "autonomy" in another. Dr. Lenhoff sees a vital contrast here between the Continent of Europe and the countries of Latin America on one side and the "Anglo-Saxon" world on the other. The present reviewer is sometimes inclined to feel that, in some ways, the United States is closer to the Continent of Europe than to Great Britain. The point is that legislative, administrative, and judicial regulation of collective labor relations is now as fundamental in the United States as on the Continent, but that in Britain a host of problems, such as "representation" questions, the recognition of unions as bargaining partners, discrimination and other "unfair labor practices," or jurisdictional disputes between unions, are hardly, if ever, thought of as "legal" problems at all. It is not for nothing that the very term "labor law" is unfamiliar to most lawyers in the United Kingdom. To understand this profound divergency in the relation between labor and the law, one must take into account the whole of a country's history and economic and social structure. This is where, in the reviewer's opinion, comparative labor law has its very special importance. Its study is impossible within a framework of purely legal terms of reference, and it necessitates a functional or sociological approach, in matters of principle as well as of detail.

Of this Dr. Lenhoff is very well aware. It is only very seldom that he succumbs to the temptation of a purely institutional or dogmatic comparison (perhaps the pages on union security are the least satisfactory in this respect), but the space at his disposal did not permit him fully to develop the theme so hopefully stated in the essay on "basic features."

That the comparative method is not only of academic interest, but of practical value to the American labor lawyer is emphasized by the authors at the point at which they introduce Dr. Lenhoff's first contribution. One of the principal advantages connected with the comparative approach is that it enables the lawyer to see his own law in perspective and helps him to see what is fundamental and what is not. The decision of the United States Supreme Court in *J. I. Case Co. v. N.L.R.B.*(1944) 321 U.S. 332, illustrates the point. Looked at from the American scene, this case may be said to have done no more than dealt with an unusual situation and adjusted the law to its requirements. But anyone even vaguely familiar with Continental labor law must realise that, as regards the relation between the law and a collective agreement, this is a piece of judicial legislation as basic as the Wagner Act was in relation to union recognition. Dr. Lenhoff's treatment of this matter is admirable. He shows the parallels and the contrasts between the *Case* decision and Continental legislation on the imperative minimum nature (the "compulsory normative effect," *effet obligatoire, Unabdingbarkeit*) of collective agreements. It is good to see that the authors have given pride of place to Mr. Justice Jackson's opinion which, in any treatise on comparative labor law, would have to appear alongside the fundamental French legislation of 1919 or the German legislation of 1918.

There is a great deal in what Dr. Lenhoff says about the place of legislation on the Continent, although, in the reviewer's submission, he understates the importance of "voluntaryism" there. Has this something to do with his general approach towards the relation between "law" and collective bargaining? True enough, where the terms of a collective agreement are legally binding on individual employers and employees, that binding force is the result of an intervention of the law, but while the law supplies the "sanction," the autonomy of the parties supplies the content of the norm to which the sanction attaches. Where that "autonomy" does not function, no amount of law can fill the gap. This is vividly shown by the contrast between the German and the French experience. Since 1936 the French law has been as comprehensive (at least) as the German law in the matter of putting legal "teeth" into collective bargaining. But in France the "teeth," at least until two years ago, had little if anything to bite, and hence the elaborate scheme, e.g. of the French law of 1946, remained the deadest of dead letters, while the corresponding West-German law of 1949 became immediately part of the living law. This was due to the much higher degree to which voluntary bargaining is developed in Germany, for reasons profoundly connected with the economic and social structures of the two countries. On the other hand, it may perhaps be said that Dr. Lenhoff overestimates the importance of Government intervention in Britain, and he is not entirely correct on the relation between minimum wage law and the Conditions of Employment and National Arbitration Order, 1940, which has now been superseded by the Industrial Disputes Order of 1951 (There is an error at p. 327, note 3).

This review has in no sense done justice to Dr. Lenhoff's work. One can only hope that he may find an opportunity of developing on a larger scale the many fruitful ideas he has expressed in his contributions to these volumes.

O. KAHN-FREUND

HAUPT, G. *Gesellschaftsrecht.* Tübingen: J. C. B. Mohr, 1952. Pp. viii, 206.

HUECK, A. *Das Recht der offenen Handelsgesellschaft.* Berlin: De Gruyter & Co., 1951. Pp. viii, 353.

SCHOLZ, F. *Kommentar zum GmbH Gesetz.* Köln: Dr. Otto Schmidt, 1951. Pp. x, 857.

The important changes in the laws of stock corporations in Germany, mainly in the thirties of this century, have necessarily affected the regulation of other commercial corporations as well, especially the laws of companies with limited liability. To mention just two of these changes: the rules relating to the supervisory board have been replaced by paragraphs 86–99 of the Stock Corporation Act of 1937; the rules concerning conversion of existing companies into another form of corporation, previously amended by a law of July 5, 1934, and the chapter relating to supervision, were redrafted in 1937. Numerous statutes and orders dealing with corporation law have survived the fall of the Nazi regime; others have been set aside; and it is not an easy task to find the right clue to the solution of many detailed questions of German corporation law through the labyrinth of the respective enactments.

This consideration, coupled with the almost unparalleled revival of private enterprise in West Germany, may explain the noticeable interest in problems of corporation law in that country. The 39th convention of German Jurists, the *Deutscher Juristentag*, in Stuttgart, 1951, had on its schedule *inter alia* the question of the forms of enterprise under the prevailing economic and social conditions, including the participation of labor in management. A series of articles in a distinguished periodical on research in the science of commercial law[1] dealt with "the future of stock corporations." No wonder that after World War II there was a perceptible need and justification for reprints and new editions bringing up to date some of the old standard works relating to these matters: Lehman, *Handelsrecht*, 1949; Schumann, *Handelsgesellschaften*, 1950; v. Gierke, *Handelsrecht und Schiffahrtsrecht*, 1949; Hueck, *Gesellschaftsrecht*, 1951, etc., and some of the well-known commentaries: Baumann-Hueck, 1951; Teichmann-Koehler, 1950; Godin-Wilhelmi 1950; etc. The three books dealt with below are new editions of works of the authors, who also in the past have made other remarkable contributions to the German literature on corporation law.

I. The outline on corporation law by Günter Haupt, late professor of Leipzig University, has been revised and completed by his friend and colleague, Professor Rudolf Reinhardt of Marburg University. It is a little masterpiece, a concise handbook, containing exact representation of the law of *all* forms

[1] Zeitschrift für handelswissenschaftliche Forschung, Köln, 1950, Nos. 6 and 7.

of corporations in Germany. It extends not only to all types of commercial corporations, but also to those envisioned by the German Civil Code (BGB), including associations without the privileges granted to corporate entities. A new chapter by Professor Reinhardt on concerns, pools, cartels, consortiums, and trusts is a valuable supplement to this edition.

It is most remarkable that the authors have succeeded in this modest volume of 206 pages not only in presenting the essence and the theoretical features of the legal institutions dealt with under the German law, but also in giving a short review of their evolution, furthermore explaining by practical examples their impact on economics and pointing to the deficiencies of certain regulations. Their suggestions as to possible remedies *de lege ferenda* are based upon experience both in Germany and in other countries.

It seldom happens that theoretical and practical points of view can be found in such a happy combination as in Haupt-Reinhardt's *Company Law*. It will serve as a reliable source not only to students of German corporation law, but to everybody desirous of becoming familiar with the major problems of company law and corporate enterprise and the trend of their evolution under the recent changes and the present aspects of the economic and social situation.

II. Professor Hueck, who has now published the second edition within five years of his work on the law of partnership in Germany, is a well-known authority in the field of corporation law. He is co-author of a commentary on the law of stock corporations and author of several interesting monographs, e.g. on unethical resolutions of stockholders' general assemblies, *Die Sittenwidrigkeit von Generalversammlungsbeschlüssen* (1929), the principle of loyalty in partnership, *Der Treuegedanke im Recht der offenen Handelsgesellschaft* (1935), etc.

Among the several sectors of corporation law, the one regulating partnerships, as codified in the German Commercial Code, 1898 (HGB), was least affected by later statutory law. Minor additions occurred in connection with the repeated changes of the German currency following the World Wars and the above-mentioned order of 1934 and Act of 1937, providing certain facilities in case of conversion, temporarily maintained until 1956. In spite of §4 HGB excluding from the category of partnership associations of small tradesmen and artisans (the latter according to Hueck's opinion without regard to the extent of their business), the form of partnership used to be and according to Hueck (p. 23) still is the most usual type of commercial corporation in Germany. The statistics referred to by him, relating to January 1st, 1939, show that there existed at that time in the Reich roughly 60,000 partnerships, 13,700 limited partnerships, 27,500 companies with limited liabilities (GmbH) and 6500 stock corporations. For the present situation Hueck does not furnish statistical data.

Though Hueck's work does not deal with the subject from the point of view of comparative law (with the exception of a few references to Swiss law), it will be of interest to the American jurist as a thorough scientific elaboration

of the law of partnership. No other corporation law of Germany, or generally of other European countries, is so similar to the respective American regulations, as the one relating to partnership. Of course there are also some notable differences. Under the American laws the partnership may be established to carry on any business for profit;[2] under the German law only for the purpose of carrying on a "trading industry" (*Handelsgewerbe*) as defined in §§1–3 HGB.[3]

Neither under the American nor under the German laws is a partnership recognized as a legal entity, but under German law a contract concluded between a partnership and a third person is not influenced by a change of one or more partners, while under American law such a contract is regarded as made with the partners collectively and can be cancelled by the other party in case one partner sells his interest to a newcomer, thus terminating the existing partnership and forming a new one.[4] Under the American law,[5] the incoming partner's liability for the obligations of the partnership arising before his admission "shall be satisfied only out of partnership property," while under the German law[6] his liability for such obligations is just as unrestricted as for later obligations, and is enforceable against his total assets, including those he has not transferred or assigned to the partnership. It would lead too far to attempt to point out all divergencies between the American and the German partnership regulations; the student of comparative law will find in Hueck's excellent work rich material and interesting stimulation. Comparison of different chapters of American and German partnership laws, for instance of those relating to the rights and obligations of a deceased partner's heirs toward the partnership (Hueck, pp. 260–278), could lead to useful suggestions for amendments to the respective rules in both countries.

III. The commentary of Professor Scholz deals exhaustively with the law of a form of corporation, the "company with limited liability," (*Gesellschaft mit beschränkter Haftung*, briefly GmbH) which has not yet appeared in the legislation of the United States. This is a company differing from the other forms of partnership in that none of the partners is liable for the company's debts in excess of the amount pledged to the company (except in case of certain violations of contractual or statutory obligations). It differs from stock companies in that the shares need not be all of equal face value, and in that no negotiable share-certificates can be issued. The administration and supervision of this type of company, usually formed by a small number of partners, are simplified, and publicity requirements reduced. Neither the German denomi-

[2] Uniform Partnership Act §6; New York Partnership Law §10.

[3] If formed for other purposes, it may be organized as an association under the Civil Code (§§705–740 BGB).

[4] Unif. Partnership Act §30; N. Y. Partnership Law §60. See Matter of Peck, 206 N. Y. (1912) 55; Ardolino v. Ierna, 225 A. D. (1929) 439, 233 N. Y. S. (1929) 477, etc.

[5] Unif. Partnership Act §17; N. Y. Partnership Law §28.

[6] §130 HGB; Hueck, 254.

nation nor the above-quoted English translation can be regarded as being exact from the legal point of view, because only the *partners'* liability is limited—the company's responsibility is unlimited. It would be more correct to speak of "limited partnership." But this denomination is reserved in the terminology of American statutes, e.g. § 90 of the New York Partnership Law, to associations with at least *one* general partner, liable beyond the capital invested or pledged by him to the company. It seems preferable therefore to employ the less exact denomination in order to avoid confusion.

This form of corporation was introduced in Germany in 1892 and has been adopted since, more or less on the German model but with some improvements, by about twenty other countries. In Latin America, it was first introduced in Brazil (1919), later in Chile and Argentina, in Cuba (1929), and in Mexico (1934). The German initiative doubtless also inspired the legislation of Great Britain; the Companies Act of 1908 made it possible to form "private companies" and to transform already existing public companies into private companies and vice versa. This form has been maintained under the subsequent Companies Acts. At present, an English private company must restrict, by its articles of association, the transfer of its shares; it cannot invite the public to subscribe for its shares, or debentures; and it cannot have members in excess of fifty. The amount of capital is not restricted. In West Germany, the minimum capital must be 20,000 German marks, the participation of a member at least 500 German marks.

The voluminous commentary of Professor Scholz (857 pages), based upon an immense German literature and on almost innumerable decisions of German courts, represents the experience of the sixty years life of this legal institution. The main features of the basic law of 1892 have remained unchanged, but by the HGB of 1898 as well as by the laws already mentioned on transformation of companies and the Stock Companies Act, 1937, some sections relating to the supervisory board, merger, etc., have been altered. The laws concerning the repeated changes of German currency, numerous orders affecting concessions required for the formation or the carrying on of some special branches of business, have added a great many complementary rules and judicial interpretations of numerous paragraphs, varying in the course of the six decades existence of this institution. In view of this situation, a compass like Scholz's commentary is a real asset for research purposes. There is hardly an imaginable legal problem connected with this form of corporation to which a reliable answer could not be found in this commentary, usually based on abundant references to court practice and literature.

In respect of several details, the divergencies between the regulations in West and in East Germany are mentioned—concessions,simplified procedure of capital reductions, etc.—and some meager references to foreign, mainly Austrian and Swiss legislation, are also to be found. The chapter on the interstate law of the GmbH (pp. 29–34), including the different theories on the nationality of such companies, is of special interest from the standpoint of

comparative law. It is regrettable that the commentary does not amplify references and comparisons with the respective regulations of other countries, though Professor Scholz is an author of distinguished articles concerning French, Belgian, and Swiss laws on companies with limited responsibilities. The traditional form and limits of German legal commentaries explain also the lack of statistical data and of entering into an examination of the economic consequences of the laws treated. Suggestions for reform and criticism may be found in the literature referred to on pp. 26–27 of the commentary.

It is the common opinion of German experts that in general—in spite of some apprehensions and certain notorious abuses made possible by reduced supervision and diminished publicity—this type of corporation did not do bad service to the economic life of the country. From the American point of view, the consideration can hardly be dismissed that discrimination by legislation between the big and small companies is almost unavoidable, if increased guarantees should be required to protect both creditors and stockholders and small corporations are not to be encumbered with unbearable burdens. A bill introduced in the Senate by Senator Frear in 1949 for amendment of the Securities Exchange Act, 1934, shows that the reform movement did not arrive at a standstill with the creation of the Securities Exchange Commission. Whether the American legislation will adopt the German form of companies with limited liability or approach a solution on the lines of English private companies—or choose a new system—will be disclosed by the future. But the above-mentioned number of German GmbH and the fact that in England in the ten years preceding the Companies Act 1948, from 1938 to 1947, the number of public companies decreased from 19,335 to 13,168, while that of private companies showed an increase from 143,221 to 218,483, indicate that a specific form for smaller limited companies may answer a practical need in countries with highly developed economies. The legislator deepening his studies in the legal side of the problem will find a helpful tool in the commentary of Professor Scholz.

ERVIN DOROGHI

DE LA GUARDIA, E. *A Statement of the Laws of Panama in Matters Affecting Business*. Washington: Pan American Union, 1951. Pp. iv, 81.

This volume consists of a summary of the principal provisions of the laws and regulations in matters affecting business in the Republic of Panama, and is part of a series of similar publications about American countries, which were initiated by the Inter-American Development Commission and continued by the Division of Law and Treaties in the Department of International Law of the Pan American Union.

The author, who recently held the position of President of the Supreme Court of Justice, and who is at present the Legal Adviser to the President of the Republic, made this statement of business legislation of Panama with the co-operation of the well-known lawyers, Dr. Galileo Solís, former Minister of Treasury, and Lic. José Antonio Molino, former Alternate Justice of the Su-

preme Court and at the present time Fiscal (Attorney) of the Tribunal de 1° Contencioso Administrativo (Court for Administrative Litigation).

The summary comprises matters relative to Nationality and Immigration, Civil Rights of Foreigners, Rights of Foreigners to engage in Commerce and Industry, Commercial Companies, Agricultural Activities, Public Lands, Forestry Legislation, Mining Activities, Monopolies and Monopolistic Activities, Taxation, Social Legislation, including Labor Relations, Patents and Trademarks, Copyright, Exchange Control, Insurance, Privileges and Concessions.

The work has special merit, not only in view of the high intellectual capacity and experience of the authors, but also because of the detailed and arduous research work which they had to perform. Their sources of information are reliable since they are based on legal texts, chiefly in official documents, such as the compilations of the Official Gazette and the Reports of the State Ministries to the National Legislative Assembly, which are not easy to find. The efforts of the authors are the more worthy of recognition as they had to consider matters pertaining to different fields, such as Constitutional Law, Administrative Law, Labor Law, Taxation, Civil Law,and Commercial Law.

In the course of the work, some gaps and inconsistencies may be noted, which, however, really do not affect its fundamental merit. For instance, when discussing the rights of foreigners to engage in business and industries (p. 12, par. 7), gambling houses are classified as wholesale commercial establishments, following the enumeration made by Law 24 of 1941 and by Decree-Law No. 12 of the same year. However, the Constitution adopted in 1946 reserves to the State the running of gambling houses, and it is understood that private enterprises in this field are not allowed at the present time.

Also, with regard to the participation of foreigners in commercial companies, it should be observed that corporations organized under Panamanian laws, even though they may be composed of foreigners, are not obligated to meet any requirements in order to do business outside the Republic of Panama. No commercial patent is necessary in this case, nor are taxes imposed on earnings obtained outside the territory of the Republic. There exists a general limitation, prohibiting ships under the Panamanian flag to traffic in the ports of Communist China.

In Chapter XVI, p. 79, it is explained that in order to permit industrial enterprises to enjoy the privileges and concessions which are there mentioned, such enterprises are obliged, among other things, ". . . c) to sell their products in the domestic market at wholesale prices within the limits fixed by the National Government." Here is a small difference with the legal text which must be corrected. The price limits, according to the Decree-Law in force cannot be arbitrarily established by the Government. The legal provision states that these price limits "will be adjusted on such bases as may be agreed upon by the National Government and the Enterprise in question. . . ."

Chapter XII on Patents and Trademarks is, in our opinion, one of the matters best dealt with. There are some repetitions, but in general it contains a complete treatment of the subject.

The authors state that in Panama there does not exist an exchange control. No reference is made to currency which is a correlative element to the concept of exchange. The Panamanian unit of currency, whica is the "Balboa," has been officially defined to consist of 987½ milligrams of gold of 0.900 fineness. In addition, the American dollar is legal tender and circulates freely in the Republic of Panama.

To the brevity of this summary is attributable the fact that no specific mention is made of legal provisions at present in effect concerning the organization of the system of courts of justice, arbitration, consular service, merchant marine (which is one of the greatest tonnage in the world) registry of ships, sales, mortgages, creditors' rights, and bankruptcy, the importance of which is obvious in business matters.

The authors make no reference to the origin or source of some commercial laws mentioned, as is desirable. Thus, in the summary of the legal provisions on business associations, no special attention is given to Law 32 of February 26, 1927, on Corporations. Its source is not mentioned. This law is generally based on provisions of the corresponding laws of several states of the American Union.

Similarly, no reference is made to some Anglo-Saxon institutions, which tend to universality, and which have been incorporated in Panamanian legislation. I refer to Law 9 of January 6, 1925, later superseded by Law 17 of 1941, on Trusts, which was adopted on the initiative of the distinguished jurist, Dr. Ricardo J. Alfaro, and to the Negotiable Instruments Law, which was approved as Law No. 52 of March 13, 1917, and is an adaptation closely following the Uniform Negotiable Instruments Law. This act has not been mentioned in this volume, even though Dr. Erasmos de la Guardia is the author of an excellent book on this subject.

The Legislative Assembly of Panama adopted in February of this year, after the issuance of this publication, Law 21 of 1952 on Chattel Mortgages, which was an institution previously unknown in Panamanian legislation.

In compiling this summary of the Panamanian business laws, the Pan American Union, and its distinguished collaborators, offer us not only useful information concerning the country through the center of which runs the Panama Canal, but also lay a basis for the unification of legislation affecting the economic and commercial life of the Americas. We hope that this task will cover a wider field and will find echo among government officials, jurists, business men, Common and Civil Law lawyers, and universities, in order to obtain the best results.

JORGE ILLUECA

HALL, J. *Theft, Law and Society.* (2nd ed.) Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. xxiv, 398.

In his Introduction to the first edition (1935) of this book, Llewellyn wrote that "to the law of Theft in particular it is the most important contribution I have met" (xv). In the present, revised edition, the book has been brought

up-to-date, especially in order to test the validity of certain generalizations in the light of statistical data accumulated since the first edition. A new chapter on embezzlement has been added, while the one on petty larceny, as well as Llewellyn's Introduction, have been omitted. Some readers will regret this omission, but they will welcome the author's own Introduction in which the progress of socio-legal studies in general is discussed in his own terms.

The work, as now presented to the reader in the second edition, is one of the best monographs in legal sociology. Among its chief merits are good organization, wise selection, and skillful handling of various methods. It is a book of which American jurisprudence may be justly proud; there is a pertinent lesson in the fact that the time and effort required to produce it have given the author some insight into the reasons for the lack of such studies. He confesses in the preface that without the opportunities and funds provided by Columbia and Indiana Universities, it could not have been written (iii). Clearly, some effort is needed to make sure that wherever such opportunities and funds are available, they should not be wasted on mediocrity but be profitably invested in what is qualitatively significant and promising. In this case, they have been so invested.

To show what is novel, significant, and promising in this treatment of legal problems, it is enough to glance at the organization of the book. The author begins with the history of a single case decided in 1473, marking a turning point in the legal history of theft, which he tries to explain by the political and economic conditions of the "commercial revolution." He then turns from the historically unique, which nevertheless displays something of the sociologically universal, to a broader historical perspective, namely, the growth of the law of theft in the eighteenth century. Whereas the *Carrier's Case* of 1473 shows the impact of the commercial revolution on a single point, namely, on the element of possession in the definition of theft, adjusted to new conditions by the device of "breaking bulk," the impact of the "industrial revolution" is seen in the sudden development of the modern classification of theft through the introduction of such specialized categories as embezzlement, larceny by trick, obtaining property by false pretenses, and receiving stolen property.

In other words, while such analysis of a single case reveals the universe in a microcosm, it appears in a spectrum of categories when the whole effect of a creative age on the law of theft is surveyed. The historical perspective also exhibits the slow process of crystallization of the substantive law respecting larceny and the immense effect of technicality and discretion in criminal law administration. This connects, indeed, the historical with the sociological perspective, on the one hand, raising the modern problem of defining the subject matter of larceny (including the question whether its dependence on the private law concept of movable property is sound) and, on the other hand, displaying the striking parallelism between eighteenth century and contemporary administrative practices to evade infliction of too severe penalties (benefit of clergy in the former and waiver of felony in the latter case). Some will find,

however, that a comparison between the Common Law and Civil Law history of theft might have been more useful than the irrelevant antiquarian detail which has found its way into even so method-conscious a book.

In the remaining part of the volume, current problems of receiving stolen property, automobile theft, and embezzlement are investigated. By concentrating on the social factors, the social phenomena, the practices of interested groups, the operation of the law and its defects are brought out clearly. Receiving stolen property, e.g., becomes a measurable problem by viewing it in the light thrown upon it by practices of professional dealers in stolen commodities and, partly also, by those of the insurance business. This kind of treatment indicates the immense effect upon large-scale theft of the business habits and, particularly, of such impediments in prosecuting the professional receiver as the requirement of the proof of guilty knowledge, the insufficiency, for the purposes of such proof, of the recent possession of the stolen goods or of the possession of other stolen goods, and the need of corroboration of the thief's testimony. From the description of the practices of insurance companies, private investigators, and informers, on the other hand, one gets the impression that recovery of stolen goods is sometimes a mere business deal between the criminal receiver and the insurer, granting impunity to the former. Considering the dependence of large-scale theft on professional receivership, the conclusion seems justified that the effective way of suppressing large-scale theft is the punishment of the professional dealer in stolen goods (as distinguished from the occasional receiver).

This treatment of the topic suggests that crime may be controlled by controlling the social factor on which it is dependent, and that one of the merits of Hall, as Llewellyn observed, lies "in *thinking through* implications of what various others know" (xix), meaning obviously the subtle knowledge of the interaction between practices of thieves, receivers, insurers, investigators, informers, and the police. Here we find, however, also what Llewellyn has called the vulnerable aspect of Hall's book. He seems to belittle the "possibility of honest tradesmen being brought within the terms of the bill as proposed," an objection voiced against the La Guardia Bill of 1929. He thinks more of the need to apprehend criminals than the need to avoid implicating innocent persons. Obviously, the possible clash between the claims of innocuous individuals and sociological treatment of crime should be minimized.

The chapter on Automobile Theft is another example of dealing with the socio-legal problem of theft by means of concentrating upon a key type that, by its sheer quantity, has become a prototype, coloring criminal behavior in general. "Is it strange," the author asks, "that they (motor cars) should loom up in our theft-problem as cattle did in that of the early English?" (234–235).

The chapter on Embezzlement, newly added, is in many respects the most illuminating. The treatment of the problem is "contrapunctal," displaying all the intricate motives and factors that counterbalance each other and leading to the masterly discovery of the lever by means of which all of them may be

controlled. This consists in requiring the surety companies to report to the state's attorney when notice of criminal defalcation is received by them from the insured (344).

Perhaps the most valuable insight gained from the book is that into the social factors in a highly developed industrial community, which condition a condoning, if not encouraging, attitude towards certain types of crimes against property (not life). What may be observed in dictatorships, on the other hand, is "lust of vengeance" in prosecuting and punishing almost every crime as a political high offense (sabotage, espionage, conspiracy, treason). Both attitudes lack proportion. The author's proposal to reinforce sound moral standards by suitable punishment ought to be read in the light of the historical experience that just punishment has served in a measure to limit the recognition of a right, an authority, to inflict measureless punishment under totalitarian regimes, which reverts to barbarism.

The author's explanation of socio-legal change combines the investigations of "institutional interactions" with "problem solving" which approximates my synoptical method (Rechtssoziologie, 1934). The author postulates "degrees of rationality in legal controls," a search for "better solutions," and reference to "substantive law" as representing the "salient facts of social problems." These apparently counterbalance the "culture lag" theory, which may be regarded as a concession to materialism, conflicting with the author's more rationalistic belief in "better solutions."

BARNA HORVATH

PERRY, J. H. *Taxation in Canada.* University of Toronto Press, 1951. Pp. xiii, 409.

Mr. Perry's book is an interesting, general survey of modern Canadian taxation for casual reading by the American teacher or practitioner. It contains only brief discussion of the history of Canadian taxation, as the author intends to cover that subject in a later volume. It will not meet the need of the teacher who is interested in theoretical or practical criticism of specific tax measures, as Mr. Perry has largely been content to describe the system rather than to criticize it. Nor will the tax practitioner interested in solving a specific tax problem likely find his answer here, since the book does not generally contain the precise citation and quotation of statutory and judicial authority that he needs. The experienced tax lawyer probably will find the book frustrating even as general reading, because of Mr. Perry's "constant resistance to the exact but dull language of the statutes," which makes the text superficially understandable but gives a lawyer trained to reliance on close reading of statutes a feeling of grasping at a will-o'-the-wisp. Presumably, however, the reader who seeks citation of statutory and judicial authority can find it in the Canadian tax services, and Mr. Perry does present some interesting contrasts of American and Canadian tax law for readers whose need is not so exacting.

In the field of substantive law, one of the contrasts presented is that of the English, Canadian, and American law relating to taxation of gains arising from the disposition of property. The English statute taxes "the annual profit or gain arising or accuring . . . from any kind of property whatever . . . and from any trade, profession, employment or vocation. . . ." Under that statute, the English do not exclude capital gains as such but do exclude casual or occasional gains. In the United States, capital gains are taxed, subject to the provisions of Sec. 117 of the Internal Revenue Code, the general effect of which is to provide reduced rates for the taxation of capital gains which have accrued over a considerable period of time. Mr. Perry does not explain the Canadian position in detail but states that, although the Canadian statutory definition of "income" is similar to that of the United States, Canadian decisions have followed the English cases in holding that capital gains are not taxable.

The basic Canadian and American divisions of taxing powers contrast strongly. In the United States, the states have general powers to tax and the federal government has had limited powers, particularly before the adoption of the Sixteenth Amendment; in Canada, the Dominion has a general power to tax and the Provinces are limited to direct taxation, under the British North America Act of 1867. In contrast to the early American belief that most of the functions of government should be left with the states, the purpose of the British North America Act was to establish a strong central government, as well as to limit the incidence of provincial taxes to residents of the provinces levying them.

An interesting sidelight on the division of taxing powers in Canada has been the use during World War II and thereafter of tax agreements whereby provinces released their privileges to levy certain direct taxes, in return for compensation from the Dominion. Such arrangements offer desirable simplicity and uniformity but would probably meet political and constitutional difficulties in the United States.

Mr. Perry discusses at length the Canadian procedure for the adoption of a budget and the enactment of tax laws. The principal point of contrast with American procedure is the greater responsibility of the Canadian executive for the taxes enacted. Tax measures are proposed by the Canadian executive and are usually enacted almost unchanged, whereas in the United States, Congress may enact a tax statute over a presidential veto. The principal reason for the difference is the fact that in the United States the president is elected separately and may not have the support of a majority in Congress; whereas a Canadian executive, under the parliamentary system, falls if its major proposals are not adopted by Parliament.

LESTER R. RUSOFF

Book Notices

COOPER, J. C. *Roman Law and the Maxim "Cujus est solum" in International Air Law.* Institute of International Air Law. Publication No. 1. Montreal: McGill University, 1952. Pp. 43.

This, the first publication of the Institute of International Air Law founded in 1951, is devoted to the analysis of the historical background of the principle stated in international air law conventions that "The High contracting parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory." The author's purpose is to show that this principle declares a rule which existed before international conventions and the age of flight itself, namely, the rule evidenced by the famous English maxim that "*Cujus est solum ejus est usque ad coelum.*" This recognition of exclusive private rights in space, originally established in municipal law, has been thought to have been subsequently carried over into international air law. But, as the author points out, this has in fact always been a rule of international air law, because states have exercised sovereign rights in space as far back in history as proof exists.

This is substantiated by a learned and minute analysis of the principles of Roman, ancient, and modern property law, indicating that since Roman times states have continuously recognized, regulated, and protected rights in space held by the owners or occupants of subjacent land. It is obvious that a state cannot give the landowner a right of property or use in the air-space above his land if that airspace is not subject to its sovereignty.

Consequently, the conclusion that land and the usable space above are legally indivisible and constitute a single social unit. In other words, although the rule "*cujus est solum*" was not part of the Roman written law, it has sprung from Roman principles.

At the same time, the author shows that the private owner of the surface never owned the space above to the point of infinity. Such claims are non-Roman. The result is that, on the one hand, the right of the sovereign to the airspace above its territory is reserved, while, on the other hand, the state may restrict private rights in such space and regulate air navigation without being impaired by exclusive property rights. J. G. CASTEL

INTERNATIONAL BAR ASSOCIATION. *Third International Conference of the Legal Profession, London.* July 19–26, 1950. Summary of Proceedings and Resolutions, Selected Papers. The Hague: Martinus Nijhoff, 1952. Pp. xi, 367.

The volume contains some useful bibliographies and citations of statutes, but on the whole the summaries are too short to be of much value to the practitioner. Among the lengthier papers of comparative private law interest are: Conflicts in Divorce (Siero Pérez, in Spanish, 126–133), International Regime of Trade Marks (Ladas, 135–144), International Justice (Carabiber, in French, 147–166), Insights to be gained from a Study of Soviet Law (Hazard, 175–182), Report of the Committee on Coastal Waters and Appurtenant Subsoil (184–197), Copyright (Chediak, Hepp, 199–213), International Economic Cooperation (Littell, 216–231), Code of Fair Treatment for Foreign Investments (Wortley, 241–249), International Procedures in Civil and Criminal Matters (Jones, 251–267), Conflict of Laws respecting Negotiable Instruments (Goldman, Hamel, in French; Yntema, 297–338). P.J.E.

THE INTERNATIONAL LAW ASSOCIATION. *Report of the Forty-Fourth Conference held at Copenhagen.* August 27th to 2nd September, 1950. 1952. Pp. cxx, 309.

The proceedings at the Copenhagen

meeting were more largely concerned with private law than with public international law. Of particular interest to the comparative private lawyer are the resolutions, committee reports, and discussion on: Nationality and Statelessness (v, 17–62), Trade Marks (vi–viii, 81–86), Rights to the Sea-Bed and its Subsoil (87–138), Corporations Engaged in International Business (viii, 158–166), Conflict of Laws (167–197), the Conference approving the Committee's Draft International Convention on Private Law Agency (v, 192, *et seq.*), Divorce: Jurisdiction and Recognition; Custody and Maintenance (198–204), Sovereign Immunity (204–217), Air Law (vi, 218–254), Commercial Arbitration (255–279), the Conference approving the draft of the International Committee, to be known as the "Rules of Copenhagen, 1950," at vi, 217). The Conference also approved the revised "York Antwerp Rules 1950" (288–395). P.J.E.

FRUIN, J. A. *De Nederlandsche Wetboeken*, zoals zij tot op 15 November 1951 zijn gewijzigd en aangevuld. (Revised by N. J. Bink). 'S-Gravenhage: Martinus Nijhoff, 1952. Pp. xli, 2942.

This new edition (the 18th) of Fruin's admirable handbook contains the codes and related legislation of the Netherlands to November 15, 1951, and supersedes the previous edition of 1947. In general, this compilation includes, with supplementary regulations and annotations, the texts of the Constitution, laws and decrees concerning judicial organization, Civil Code, Commercial Code with laws on bankruptcy and life insurance, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure with the law on economic delicts, the laws relating to notaries, stamp tax, registration of acts, hypothecs, marine liens, and an extensive "list" of special legislation, chronologically reproduced; there are also an alphabetical index and an instructive table of abbreviations. Particularly useful is the section of treaties and attendant decrees concerning international private law on pp. 1259–1439, which supplement the Code of Civil Procedure. An innovation in this edition is the inclusion of the texts of various treaties concerning industrial property in the chronological "list". On the other hand, as explained in the preface, the regulations on special jurisdictions and a number of regulations relating to the occupation period, originally repealed as of February 1, 1952, but later extended while the work was in press, have been excluded. Needless to say, this careful compilation of the increasing volume of Dutch legislation is indispensable for those who may wish to consult the current laws of the Netherlands. H.E.Y.

JAMES, CHARLES F. *The Story of The Performing Right Society*, London: The Performing Right Society, 1951. Pp. 148.

This book reveals the impressive story of the British Performing Right Society. The former Secretary and General Manager of the Society reviews the first 36 years of its existence and progress in this interesting volume. The story is strewn with reports of legal struggles and controversies similar to those which ASCAP has experienced in this country. The victorious record of the Society throughout most of its legal battles is most impressive and there is every reason to believe that the Society will continue to prosper during the second half of the century. W.J.D.

SERENI, A. P. *Italian Law*. Reprint from "Italian Culture in the Twentieth Century," 1952. Pp. 63–72.

The above lecture, given at the Casa Italiana, Columbia University, on April 19, 1952, gives a "panoramic view"—nonetheless useful, however—of Italian legal life during the first half of this century, preceded by a short recapitulation of the past. Modern Italian law, the law that developed after the unification of Italy, showed

first the influence of French, later of German legal science, before it found its own characteristic evolution, the truly Italian sense of measure and balance, the conception of law as a means to an end, and the intensive interaction of life and law. Italian legal science has produced three outstanding contributions to modern law in the fields of criminology, civil procedure, and international law. Contemporary Italian law is predominantly social. The Penal Code of 1931, the Civil Code of 1942, and the Code of Navigation of the same year conceive of the individual as a part of the community to which he belongs. This necessarily entails limitation of many individual rights and of free private initiative, in favor of the nation as a unit. Good faith and fair dealing, however, remain as the foundations of human intercourse. V.B.

IMBERT, L. *L'Évolution du Recours pour Excès de Pouvoir, 1872–1900.* Paris: Librairie Dalloz, 1952. Pp. vi, 214.

In effect, this work presents a useful digest, within the frame of a concise analysis, of the decisions of the Conseil d'État concerning the development of the *recours pour excès de pouvoir* as the "synthesis of the legal control of the Administration" from 1872 to 1900. This development of the *recours* as the central process of control over governmental activities, involved (a) its legalization (*caractère jurisdictionel*) and (b) its objectivation (*caractère objectif*). Concise summaries are given of the influence of these two aspects upon: (a) the scope and procedure of the *recours*, and (b) the conception of law (*légalité*), the means of control (lack of jurisdiction, formal defects, "*détournement de pouvoir*", illegality), and the procedural consequences. H.E.Y.

VAN WAESBERGE, TH. H. G. A.—VAN VLIJMEN, G. J. H. *Wet op de Economische Delicten.* Dokkum: Uitgeverij Schaafsma & Brouwer (1952). Pp. 112.

An annotated edition of the Dutch Law Concerning Economic Delicts of June 22, 1950, regulating the investigation, enforcement, and adjudication of economic offenses, apparently designed for use by enforcement officers. H.E.Y.

VILLALBA WELSH, A. *El Derecho Notarial a la Luz de la Teoría Egológica.* Buenos Aires: Ed. Revista Internacional del Notariado, 1952. Pp. 46; bibliography, 44–46.

The importance of notaries in civil law countries, constituting a distinct branch of the legal profession, in contrast with their insignificance in our system, has always been evident, but in the past their practice has been an art without pretensions to science. Only in recent years have the Latin notaries become so to speak self-conscious, holding regional meetings which blossomed into the First International Congress of Latin Notaries held at Buenos Aires in 1948, founding an International Union of Latin Notaries and its own Review. A later Congress was held at Madrid. A tendency, not uncommon in Latin America, to splinter law into subdivisions is manifest in this field also. The aim of this brochure is to delimit and define notarial law, in its strict sense, apart from the collateral functions of a notary as counsel, title-searcher, etc. Analysis is made of the functions of a notary as a public officer and as the creator of the *form* of instruments. It is these functions that constitute "notarial law" in its strict sense as an autonomous branch of the law. The analysis is made in the light of the prevalent Argentine school of philosophy of law: the egological theory of Dr. Carlos Cossio (see Kunz: Latin American Legal Philosophy (1950) and Dr. Cossio's own articles in Latin-American Legal Philosophy (1948) and in 52 Columbia Law Review (1952) 356, 479). P.J.E.

PEDEMONTE, E. *Le Transformazioni delle Società Commerciali nella Legislazione*

e nella Giurisprudenza. Genova: Di Stefano, 1952, Pp. 17.

In this short essay, the author examines the difficult problem involved in changing a given type of corporate organization into one of the other kinds provided by the law.

Referring primarily to the regulations offered on the subject by the Civil Code, the author includes in his comment consideration of some of the leading decisions of the Italian courts. Special attention is devoted to the formalities which are to be followed in effecting the change, to the liability of the members of the transformed company, to the taxes which have to be applied during the proceeding, and to some of the other questions that frequently arise in this kind of situation.

Despite a lack of comprehensiveness due to its limited size, the pamphlet presents a useful outlook on a problem which for the first time has been considered by the law-maker in the Italian Civil Code of 1942. GIORGIO BERNINI

BEUTEL, F. K. *Interpretation of Uniform Commercial Laws. Cases and Materials.* Indianapolis: The Bobbs-Merrill Co., Inc., 1950. Pp. xxiii, 881. Supplement Pp. 196.

The case book is, I believe, as American as the skyscraper. Though some imitations have been set up abroad, the most numerous and imposing collections of both items are still to be seen on American soil and American bookshelves.

The present effort by Professor Beutel follows the new trend in case book architecture by festooning the massive bulk of cases with well-chosen excerpts from review articles and books, with sections taken from the Restatement on Contracts, on Agency, on Restitution, with "problems" relating to the various points raised in the cases or left open by them, and even with reproductions of different forms of commercial paper. A novel feature (at least to me) is the Supplement, a conveniently detachable part, where are reproduced in full the Negotiable Instruments Law, the Bills of Exchange Act, 1882, the Uniform Sales Act, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, the Uniform Stock Transfer Act, and the Uniform Fiduciaries Act, together with the Commissioners' Notes. As pointed out in the Introduction, the mobility of this Supplement will enable the student to have constantly before him, during class discussion, the indispensable statutory material.

For those who are interested in American law as foreign law, this case book appears to be a reliable compass. Indeed, for the study of an important section of American commercial law and the understanding of the interpretative technique in general by which American courts make statutory law effective, this volume offers an impressive amount of facts and ideas.

R. DE NOVA

VAN EYSINGA, W. J. M. *Hugo Grotius. Eine Biographische Skizze.* Mit einem Vorwort von Werner Kaegi. Basel: Benno Schwabe & Co. Verlag (1952). Pp. 140.

It is passing strange, as Professor Kaegi intimates in an introduction to the present brief account of Grotius' life, that a figure of such stature in modern history, "the founder of natural law, the father of international law, the defender of freedom and toleration, Erasmus' greatest pupil," should be today among the "significant unknown" for want of a modern critical biography, such as van Vollenhoven was planning on his death in 1933. The present work, prepared in lieu thereof to commemorate the 300th anniversary of Grotius' death, and here presented in a competent German translation of the brief but excellent life of Hugo Grotius by a distinguished scholar, formerly professor at Leiden and a member of the Hague Permanent Court, which was originally published in Dutch in 1945 by the Vereeniging voor de Uitgave van Grotius, thus fills

a distinct need. A brief list of the principal works of Grotius is appended.

H.E.Y.

HUBER, K. *Leibniz.* Herausgegeben von Inge Köck in Verbindung mit Clara Huber. München: Verlag von R. Oldenbourg, 1951. Pp. 451.

This sketch of the life of the most puzzling figure in German philosophy is divided into chapters following the principal places where Leibniz lived (Mainz, Paris, Hannover). Although not an exact scientific biography, this work, completed by the author, a professor of Munich University, while under arrest prior to his execution in 1943, satisfies a long-felt need by providing an interpretation of Leibniz, supported by intensive study of his manuscripts, a formidable task that has deterred would-be biographers ever since Guhrauer's work appeared in 1842.

Leibniz was not only interested in jurisprudence but tried to set up a *caracteristica universalis*, or universal symbolic logic, an idea still haunting some schools of jurisprudence. He was a first class scientist, ranking with Newton, member of the Royal Society (London), the French Academy, and first president of the Berlin Academy. He sought to reunite Protestantism and Catholicism, was offered the Cardinal's hat, which he, a Protestant, declined. More strangely, at the beginning of his career, he refused a professorship of law to become secretary, first to the Rosicrucians, later to several more or less enlightened German princes.

Leibniz was one of the last philosophers who firmly believed that jurisprudence may be furthered *more geometrico*, that is to say, using an exact mathematical method. At the same time, he was the last of the great metaphysicians of the older school. Inspired by, as well as revolting against, Descartes, Hobbes, Spinoza and Locke, he elaborated one of the most challenging theories of *substance*. By this the causal laws of the phenomenal world are turned into mere logical unfolding of the analytical predicates of a previously defined subject (substance): the full concept of Caesar implies his passing the Rubicon; that of Plato writing the Republic or the Laws. Similarly, Adolf Merkl, inventor of the legal flight of stairs (*rechtlicher Stufenbau*), regards future changes of the law as implied, hidden in the folds of the constitution (*Die Lehre von der Rechtskraft*, 1923).

Huber's book may serve as a good background to the fine analysis of Leibniz's legal works by Huntington Cairns[1] (who seems to have read them, which is more than most can say) featuring the broader aspects of their immense theoretical as well as practical significance.

BARNA HORVATH

ROSS, A. *Why Democracy?* Cambridge: Harvard University Press, 1952. Pp. vii, 249.

Although slightly misleading in its title which suggests primarily a political bent, this treatise is an excellent historical and analytical résumé of the legal bases and essence of democracy, also including a comparative estimate of the varieties of governmental forms for its realization. The author, professor of international law in the University of Copenhagen, whose contributions to modern legal philosophy are outstanding, gives with the unmistakable authority of the expert a concise historical analysis of the philosophical ideas that led to the political events of the Reformation, the American and French Revolutions, the constitutional monarchies of the nineteenth century, and, finally, the modern democracies, developing from their birth in liberal laissez faire in politics and economics to the present stage, interrupted, or perhaps accelerated, by the period of fascism, that points more and more towards governmental interference and control.

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[1] Legal Philosophy from Plato to Hegel (1949) 295–334.

The main part of the book, however, centers around the definition of democracy as a *form* of government together with the *values* which it incorporates. The formal definition is the easier; it means a form of government in which the political functions are exercised by the people with maximum intensity, effectiveness, and extensiveness in a parliamentary manner. On the other hand, the realization of democratic values: public security, individual autonomy, intellectual liberty, in short, freedom from oppression and fear, is not necessarily connected with the democratic form of government. Freedom from want is the goal of socialism and not of democracy.

On the level of ideas, political form and economic substance are strictly separated; nevertheless, in practice they may lead to such combinations as capitalist autocracy, socialist autocracy, capitalist democracy, and socialist democracy. The last combination, as Professor Ross somewhat wistfully remarks, is not yet found anywhere in the world. The chapter dealing with the technique of democracy considers the "how" of democratic procedure: control over legislative power, control over government, control over public servants, the choice between unicameralism or bicameralism. Of outstanding timeliness and importance is the discussion of democracy's self-defense—the limitations on freedom. The solution of this problem lies in the future. V.B.

BREWER, J. M. *The Wellsprings of Democracy*. New York: Philosophical Library, 1952. Pp. xii, 232.

Addressed to the realization of democratic control throughout the nation, this volume is closely connected, but on a strictly technical level, with Professor Ross's above-mentioned book. The late author, professor emeritus of Harvard University, collected information on the topic of democratic procedure for over forty years; his book is a textbook on democratic organization and procedural rules. Detailed instructions are given on the structure of a union, various local organizations, church or civic societies. Democratic organization involves, even in the smallest of associations, the division into legislative, executive, and judicial functions, the possibility of free debate and decision, and the selection of officers through an elaborate and extensive voting system. A whole chapter describes the use of parliamentary motions during an ordinary business meeting, and an appendix gives samples of bylaws, standing rules, procedural rules of an executive board, together with eventual topics for a conference of an executive board, committee chairmen, etc. This is a practical book for the large number of public-minded laymen without legal training who may wish to participate in the political or business life of their communities. V.B.

DOWLING, N. T. *Cases on Constitutional Law*. Brooklyn: The Foundation Press, Inc., 1950. Pp. 1273. Supplementary material 1952. Pp. 69.

This is the fourth edition of a most useful tool for the study of constitutional law. The selection of cases, from old to new, is particularly illuminating. The notes maintain a high standard of scholarship. A new introductory chapter on the origin of judicial review (by J. M. Kernochan) is of special interest.

But a European lawyer cannot be satisfied with the restricted meaning herein given to constitutional law. I agree that such a case book must be limited to those parts of constitutional law which are interpreted, construed, or created by courts. While courts pass mainly on individual rights, their decisions are a key for the understanding of the structure of the State and the form of the Government. Nonetheless, cases are here presented and analysed almost purely from the point of view of the prospective litigant. This should be done, of course, but not exclusively. In consequence, we learn nothing, except as a by-product, on the nature of

the federal system as interpreted by courts. The treaty power of the United States is hidden in the chapter dealing with the powers of the President in the conduct of foreign affairs. The relations between international law and domestic law (as seen by courts) are thus analyzed as by-products. The organization and powers of the electorate, the backbone of constitutional democracy, are incidentally treated (pp. 1103–1127). The same remarks could be made concerning Congress, the President, and the Judiciary. As Professor Dowling himself writes: in constitutional cases "... larger and higher interests are involved and they are viewed in a wider perspective" (p. 70). Thus, it would not appear that a presentation of cases that would give a general picture of constitutional law, in the broad sense, as seen through judicial decisions, would impair the effectiveness of the future practising constitutional lawyer.

Moreover, it is surprising not to find an evaluation of judicial review as it now stands. No systematic differentiation seems to be made between judicial review of Acts of Congress, of orders and decisions of the President and the administration, of member States' laws. When it is considered that, in the period from 1940 to 1951, only two congressional enactments have been declared unconstitutional (*Tot* v. *United States*, 319 U. S. 463 (1943), noted p. 763; *United States* v. *Lovet*, 328 U. S. 303 (1946), noted p. 766), one may wonder what has become of judicial review of Acts of Congress. ROGER PINTO

POLAK, M. V. *Schets van het Amerikaanse Uniestaatsrecht*. Leiden: Universitaire Pers, 1951. 2nd ed. Pp. viii, 120.

This is an informed, well-balanced, lively, and penetrating account of the federal government of the United States. Within less than a hundred pages, the principal features of the federal system are described in the light of their historic development and as they appear today under the impact of the critical problems to which the system has had to be adjusted during the past twenty years. This compact treatment, covering in turn the Constitution, the division of powers between Union and States, the structure of the federal government—separation of powers, control of foreign affairs, interrelations between the executive and the legislature, the independent agencies, and the judiciary—and also the party system, emphasizes basic aspects and trends the significance of which, sometimes obscured by close familiarity, becomes obvious in the perspective of a perspicacious observer abroad. From this point of view, the author's references to the control of the Executive over foreign affairs as a "dictatorial" fourth power, the fluctuating balance of power between President and Congress, the superior stability of the presidential as compared with the parliamentary system in critical situations, and the acute problem of the protection of civil rights, are of interest.

H.E.Y.

TALBOTT, F. *Intergovernmental Relations and the Courts*. Intergovernmental Relations in the United States as Observed in the State of Minnesota. (Number 1 in a series of research monographs edited by William Anderson and Edward W. Weidner.) Minneapolis: University of Minnesota Press, 1950. Pp. 145.

The University of Minnesota has instituted the present series, with a grant from the Rockefeller Foundation, to demonstrate the possibilities of research concerning contemporary intergovernmental relations and to reveal its intricacies and difficulties. Other studies will deal with highways, education, public finance, social welfare, and other subjects. The principal author, whose fields are history and political science, spent half time on the project for two years. The sections on historical development of court systems, constitutional doctrine, and the dual court system are concise and readable. There are many excellent

charts and statistical tables dealing with personnel, caseload, and interagency practices of state courts, particularly probate and justice courts.

But it must be added that much of the material in the study—notably that dealing with technical problems of removal, conflicts of laws, and court reform movements—is legally inadequate. Many serious legal problems are ignored, and many implications not grasped, so that the general analysis is distorted. It is a pity that the section of judicial administration of the American Bar Association, the Conference of Chief Justices, the American Judicature Society, or similar groups with much material on these points, could not have served in a consultative capacity to the end that basic court machinery, and prevailing trends in the important current court reform movements, might have been dealt with more professionally.

Lest the reader fear that courts are yielding to the onslaughts from the administrative side, note the cheerful philosophy with which one judge answered the author's questionnaire dealing with relationships between the board of county commissioners and the probate courts. They were summed up by the judge as "pleasant but unavailing." MAXINE BOORD VIRTUE

COLLINS, C. *Public Administration in Hong Kong*. New York: Royal Institute of International Affairs, 1952, Pp. ix, 189.

This book is another in the series of studies, sponsored jointly by the Royal Institute of International Affairs and the Institute of Pacific Relations, which deal with the history and requirements of public administration in the countries of Eastern Asia. The volume under review, in addition to reproducing useful data on the legal and administrative development of Hong Kong from the original records in London covers one of the most interesting chapters in the history of colonization.

The rise of Hong Kong from a barren little island, first occupied by Great Britain in 1841 and formally ceded by the Chinese Government in 1842 by the Treaty of Nanking, to one of the politically and economically most important ports, is depicted on the background of the historical development of this period. The greatest obstacles to effective public administration: the great distance between the colony and England, political graft in the Chinese official body, and the opium trade, were overcome at the beginning of this century through the rapid improvement of communications and Government monopoly of the opium trade. In 1917, the Letters Patent re-settled the Constitution and the functions of the legislative and executive councils; the membership was increased in 1921 and 1928 to include unofficial members, among them some Chinese. The latest proposals for constitutional reform, whereby the people of the colony are to be given a more responsible share in the management of their own affairs, were introduced in 1946 by the so-called "Young" plan. The debates on this subject are still going on. V.B.

Books Received

Mention in this list does not preclude a later review

Argentina

Alvarez, E. C. *Problèmes de Droit Comparé*. Cordoba: Imprenta de la Universidad, 1952. Pp. 36.

Australia

Cowen, Z. *Full Faith and Credit. The Australian Experience*. Offprint from *Res Judicatae*. Vol. 6, July, 1952, No. 1. Pp. 27–59.

Tammelo, I. *Rational Man and Radical Doubt*. Sydney: Estonian Academic Society, 1952. Pp. 24.

Austria

Bolla, S. *Grundriss des österreichischen Internationalen Privatrechtes*. Vienna: Verlag Brüder Hollinek, 1952. Pp. 134.

Belgium

Documentation Juridique Étrangère. Nos. 2/3, 4/5. Bruxelles: Ministère des Affaires Étrangères et du Commerce Extérieur, Service de Législation Étrangère, 1952. Pp. 313, 251.

Textes Législatifs Étrangers. Nos. 2, 3. Bruxelles: Ministère des Affaires Étrangères et du Commerce Extérieur, Service de Législation Étrangère, 1952. Pp. 171, 145.

Report of the Forty-third Conference held at Brussels. August 29th to September 4th, 1948. The International Law Association, 1950. Pp. cxxi, 318.

Straschnov, G. *Le Droit d'Auteur et les Droits Connexes en Radiodiffusion*. Bruxelles: Établissements Émile Bruylant, 1948. Pp. 260.

Canada

Cooper, J. C. *Roman Law and the Maxim "Cujus est Solum" in International Air Law*. Montreal: Institute of International Air Law, McGill University, 1952. Pp. 43.

The Empire Law List, 1952–53. Toronto: Butterworth & Co., 1952. Pp. 532.

Petrie, J. R., *The Taxation of Corporate Income in Canada*. Toronto: University of Toronto Press, 1952. Pp. xvii, 380.

Phillips, N. F. *U. S. Taxation of Foreign Entities*. Toronto: Carswell Co., 1952. Pp. xxxviii, 379.

Finland

Lahtinen, O. *Zum Aufbau der rechtlichen Grundlagen*. Helsinki: 1951. Pp. 202.

France

Baudhuin, F. *Les Finances de 1939 à 1949; Vol. III: La Belgique et la Hollande*. Paris: Librairie de Médicis, 1950. Pp. 177.

La Distinction du Droit Privé et du Droit Public et l'Entreprise Publique. Archives de Philosophie du Droit. Paris: Recueil Sirey, 1952. Pp. 245.

Le Conseil d'État. Livre Jubilaire. Paris: Recueil Sirey, 1952. Pp. 688.

Gervais, A. *La Jurisprudence Allemande des Prises Maritimes dans la Seconde Guerre Mondiale*. Extrait de la Revue Générale de Droit International Public. Paris: Pedone, 1951. Pp. 64.

Grech, G. *Les Chambres Arbitrales et L'Arbitrage Commercial (Loi du 31 Décembre 1925)*. Paris: Librairie Générale de Droit et de Jurisprudence, 1952. Pp. 167.

Imbert, L. *L'Évolution du Recours pour Excès de Pouvoir 1872–1900*. Paris: Librairie Dalloz, 1952. Pp. vi, 214.

Maury, J. *Des Conflits de Lois en Matière d'Exécution Testamentaire et d'Administration des Successions*. Extrait du Recueil de l'Académie de Législation. Toulouse: Imprimerie Universitaire, 1952. Pp. 12 (lith.)

Maury, J. *Le Concept et le Rôle de la Cause des Obligations dans la Jurisprudence*. Extrait de la Revue Internationale de Droit Comparé, 1951. No. 3. Agen: Imprimerie Moderne, 1951. Pp. 18.

Mirkine-Guetzévitch, B. *Les Constitu-*

tions Européennes. Tome Second: Textes des Constitutions (France à Yougoslavie). Paris: Presses Universitaires de France, 1951. Pp. 427–882.

MIRKINE-GUETZÉVITCH, B.—PUGET, H., ed. *Montesquieu. Sa Pensée Politique et Constitutionnelle*. Bicentenaire de l'Ésprit des Lois (1748–1949). Ouvrage publié sous les auspices du Centre Français de Droit Comparé et avec le concours du Centre Nacional de la Recherche Scientifique. Paris: Recueil Sirey, 1952. Pp. 328.

PERELMAN, C.—OLBRECHTS-TYTECA, L. *Rhétorique et Philosophie*. Paris: Presses Universitaires de France, 1952. pp. 160.

RAZI, G. M. *Le Droit sur les Nouvelles. Agences d'Informations—Entreprises de Presse*. Institut de Droit Comparé. Paris: Recueil Sirey, 1952. Pp. 200.

ROLLAND, L.-LAMPUÉ, P. *Précis de Droit des Pays d'Outre-Mer (Territoires, Départements, États Associés)* Paris: Librairie Dalloz, 1952. Pp. 586.

ROUBIER, P. *Le Droit de la Propriété Industrielle*. Paris: Recueil Sirey, 1952. Pp. 612.

ROUGIER, L. *La France à la Recherche d'une Constitution*. Paris: Recueil Sirey, 1952. Pp. xii, 204.

SAVATIER, R. *Les Métamorphoses Économiques et Sociales du Droit Civil d'Aujourd'hui*. Paris: Librairie Dalloz, 1952. Pp. 310.

TCHIRKOVICH, S. *La Nouvelle Convention Internationale Relative au Statut des Réfugiés*. Extrait de la Revue Générale de Droit International Public. Paris: Pedone, 1951. Pp. 22.

Travaux de la Commission de Réforme du Code de Commerce et du Droit des Sociétés. Vols. II & III. Paris: Librairie Générale de Droit et de Jurisprudence, 1951–1952. Pp. 566, 549.

ZAJTAY, I. *Introduction à l'Étude du Droit Hongrois (La Formation Historique du Droit Civil)*. Institut de Droit Comparé de l'Université de Paris. Paris: Recueil Sirey, 1952. Pp. 210.

GERMANY

AUBIN-ZWEIGERT. *Rechtsvergleichung im Deutschen Hochschulunterricht*. Tübingen: J. C. B. Mohr, 1952. Pp. 65.

BÖHM, F. *Das wirtschaftliche Mitbestimmungsrecht der Arbeiter im Betrieb*. ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft. Düsseldorf und München: Verlag Helmut Küpper vormals Georg Bondi, 1952. Pp. 54.

FEHR, H. *Deutsche Rechtsgeschichte*. 5th ed. Berlin: Walter de Gruyter & Co., 1952. Pp. 288.

ISAY, R. *Deutsches Kohlenwirtschaftsrecht im Rahmen des Schumanplans*. Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1952. Pp. 36.

KÜNEMUND, A., *Das englische Gesetz über Kriminalrechtspflege von 1948*. Berlin: Walter de Gruyter & Co., 1952. Pp. xx, 93.

LANGEN, E. *Kommentar zum Devisengesetz*. Heidelberg: Verlagsgesellschaft Recht und Wirtschaft, 1952. Pp. 424.

MARCUS, DR. F. *Das Staatsangehörigkeitsrecht der Nordischen Staaten. Dänemark, Norwegen, Schweden, Finland, Island*. Frankfurt: Verlag Alfred Metzner, 1952. Pp. 171.

MORRIS, J. H. C. *The Recognition of polygamous marriages in English law*. Tübingen: J. C. B. Mohr, 1952. Pp. 50.

MUNDA, A. *Das Jugoslawische Strafgesetzbuch*. Institut für ausländisches und internationales Strafrecht, Universität Freiburg/Br. Berlin: Walter de Gruyter & Co., 1952. Pp. xii, 110.

SCHMIED, E. *Das Tschechoslowakische Strafgesetzbuch*. Institut für ausländisches und internationales Strafrecht, Universität Freiburg/Br. Berlin: Walter de Gruyter & Co., 1952. Pp. 137.

RADBRUCH, G. *Eine Feuerbach-Gedenkrede, sowie drei Aufsätze aus dem wissenschaftlichen Nachlass*. Tübingen: J. C. B. Mohr, 1952. Pp. 34.

GREAT BRITAIN

GRAVESON, R. H. *The Conflict of Laws*, 2nd ed. London: Sweet & Maxwell 1952. Pp. xxxii, 452.

HANBURY, H. G. *The Principles of Agency*. London: Stevens & Sons, Ltd., 1952, Pp. 237.

HURWITZ, S. *Criminology*. With a foreword by Thorsten Sellin. London:

George Allen & Unwin, Ltd., 1952. Pp. 442.

Manual of German Law. Volume II. Private International Law, Civil Procedure, Criminal Law, Criminal Procedure. London: Her Majesty's Stationery Office, 1952. Pp. xv, 167.

WIGHT, M. *British Colonial Constitutions* 1947. Oxford: Clarendon Press, 1952. Pp. 571.

GREECE

SAVIDIS, X. *Le Nouveau Code Civil de la Grèce.* Athènes: Imprimerie Gert. Cristou, 1940. Pp. 416.

VALLINDAS, P. G. *Le Droit international privé dans le Code civil hellénique.* Extrait de la *Revue International de Droit Comparé* (continuation du *Bulletin de la Société de Législation Comparée*), 1949, Nos. 1–2. Agen: Imprimerie Moderne, 1949. Pp. 9.

VALLINDAS, P. G. Εισαγωγὴ εἰς τὸ συγκριτικον δίκαιον (*Introduction to Comparative Law*). Salonika: Sabba Gartagne, 1952. Student's Edition. Mimeographed. Pp. viii, 148.

VALLINDAS, P. *V. Les principes de la bilatéralité et de la possibilité d'internationalisation des règles du droit international privé.* Extrait de la *Revue Hellénique de Droit International.* 1ère année (1948) No. 4. Athènes. 1948. Pp. 9.

ITALY

ASCARELLI, T. *Studi di Diritto Comparato e in Tema di Interpretazione.* Milano: Dott. A. Giuffrè, 1952. Pp. liii, 335.

ASCARELLI, T. *Studi Giuridici Sulla Moneta.* Milano: Dott. A. Giuffrè, 1952. Pp. 320.

ASCARELLI, T. *Studi in Tema di Contratti.* Milano: Dott. A. Giuffrè, 1952. Pp. 588.

ASCARELLI, T. *Studi in Tema di Società.* Milano: Dott. A. Giuffrè, 1952. Pp. xiv, 449.

BALOGH, E. *Adaptation of law to economic conditions in ancient Greece.* Estratto dagli *Studi in Onore di Vincenzo Arangio-Ruiz.* Naples: Casa Editrice Jovene, 1952. Pp. 10.

CAPUZZO, L. *Elementi di Diritto Costituzionale Italiano.* Rome: Editrice "Domani", 1952, Pp. 105.

CIMMINO, R. *La Disciplina Economica e Giuridica del Commercio con l'Estero.* Rome, 1952. Pp. 339.

CIMMINO, R. *Le Violazioni Valutarie.* Rome, 1952. Pp. 229.

GORLA, G. *Causa, Consideration e Forma Nell'Atto di Alienazione inter Vivos. La Rinuncia e il Contratto Modificativo, l'Offerta Irrevocabile nella Civil Law e nella Common Law.* Estratto dalla *Rivista del Diritto Commerciale.* Anno L (1952) N. 5/10 Parte I. Milano: Dott. Francesco Vallardi, 1952. Pp. 173–413.

MARTINENGHI, F. *Manuale delle Società Secondo il Nuovo Codice Civile.* 8th ed. Milano: Pirola, 1952. Pp. 360.

PANNAIN, R. *Delitti Contro La Moralità Pubblica e il Buon Costume.* Torino: Casa Editrice U.T.E.T., 1952. Pp. 182.

PAU, G. *Caratteri del Diritto Internazionale Privato.* Rome: Edizioni dell' Ateneo, 1951. Pp. 93.

PEDEMONTE, E. *Le Trasformazioni delle Società Commerciali nella Legislazione e nella Giurisprudenza.* Genova: Di Stefano, 1952. Pp. 17.

ROTONDI, M. *Istituzioni di Diritto Privato.* Pavia: Tipografia del Libro, 1952. Pp. xiv, 730.

VITTA, E. *Il Diritto Interpersonale. Estratto* dall'*Annuario di Diritto Comparato e di Studi Legislativi.* Vol. XXVIII. Fasc. 1. Rome: Istituto Italiano di Studi Legislativi, 1952. Pp. 119–230.

ZAMPELLA, F. *Documenti Mercantili e Commercio Internazionale.* Milano: Pirola, 1952. Pp. 124.

NETHERLANDS

Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America). 1952. Leyden: A. W. Sijthoff, 1952. Pp. 57.

INTERNATIONAL COURT OF JUSTICE. *Yearbook 1951–1952.* Leiden: A. W. Sijthoff. Pp. 242.

INTERNATIONAL COURT OF JUSTICE. *Index*

to the Reports of Judgments, Advisory Opinions, and Orders. Leiden: A. W. Sijthoff. Pp. 211–292.

INTERNATIONAL COURT OF JUSTICE. *Nottebohm Case.* (*Liechtenstein v. Guatemala*). Order of January 26th, 1952; Order of March 7th, 1952. Leiden: A. W. Sijthoff. Pp. 10–11; 19–20.

INTERNATIONAL COURT OF JUSTICE. *Anglo-Iranian Oil Co. Case.* (*United Kingdom v. Iran*). Order of February 11th, 1952; Judgment of July 22nd, 1952. Leiden: A. W. Sijthoff. Pp. 13–14; 93–171.

INTERNATIONAL COURT OF JUSTICE. *The Minquiers and Ecrehos Case.* (*United Kingdom/France*). Order of January 15th, 1952; Order of June 26th, 1952; Order of August 27th, 1952. Leiden: A. W. Sijthoff. Pp. 4–5; 25–26; 173–174.

INTERNATIONAL COURT OF JUSTICE. *Case Concerning Rights of Nationals of the United States of America in Morocco.* (*France v. United States of America*). Order of March 31st, 1952. Leiden: A. W. Sijthoff. Pp. 22, 23.

INTERNATIONAL COURT OF JUSTICE. *Ambatielos Case.* (*Greece v. United Kingdom*). Order of January 16th, 1952; Order of February 14th, 1952; Judgment of July 1st, 1952; Order of July 18th, 1952. Leiden: A. W. Sijthoff Pp. 7–8; 16–17; 28–88; 90–91.

VAN DUIJN, G. *The Consequences of the Introduction of Unemployment Insurance*. The Hague: Staatsdrukkerij-en-Uitgeverijbedrijf, 1952. Pp. 26.

FRUIN, J. A. *Nederlandsche Wetboeken*. The Hague: Martinus Nijhoff N.V., 1952. Pp. 2942.

GERRETSON, C. *Doch Rjocht*! Dokkum: J. Kamminga. Pp. 13.

DE GROOT, H. *Inleidinge tot de Hollandsche Rechts-Geleerdheid*. With the author's original and newly discovered corrections, improvements, additions and notes, edited by Folke Dovring (Lund) H. F. W. D. Fisher (Leyden) and E. M. Meijers (Leyden). Preface in Dutch and English. Leiden: Universitaire Pers Leiden, 1952. Pp. xxx, 400.

IDENBURG, P. I. *Agrarisch Recht in Algerije*. Leiden: Universitaire Pers Leiden, 1951. Pp. 25.

VEEGENS, D. J. *Volkskarakter en Recht*. Leiden: Universitaire Pers Leiden, 1952. Pp. 12.

VERSTEEG, T. A. *Overzicht XVIII van Privaatrechtelijke Uitspraken van den Hogen Raad*. The Hague: A. Jongbloed & Zoon, 1952. Pp. vii, 263.

VERSTEEG, TH. A. *Overzicht XIX van Privaatrechtelijke Uitspraken van den Hogen Raad*. The Hague: A. Jongbloed & Zoon, 1952. Pp. 80.

Wet op de Economische Delicten. Dokkum: Schaafsma & Brouwer, 1952. Pp. 112.

PANAMA

LLOPIS, M. C. *La Hipoteca en el Derecho Comparado*. Estudio de Derecho Comparado. Panama: Imprenta Nacional, 1952. Pp. 321.

SPAIN

MAURY, J. *L'Éviction de la Loi Normalement Compétente: L'Ordre Public International et la Fraude à la Loi*. Valladolid: Casa Martin, 1952. Pp. 171.

SWITZERLAND

GUGGENHEIM, P. *Lehrbuch des Völkerrechts*. Band II. Basel: Verlag für Recht und Gesellschaft AG, 1951. Pp. xxiii, 1044.

HAEFLIGER, A. *Der Begriff der Urkunde im Schweizerischen Strafrecht*. Vol. 6. Basel: Verlag für Recht und Gesellschaft AG, 1952. Pp. 76.

HÄMMERLI, M. *Die Haftung des Flugplatzhalters im Schweizerischen Recht*. Bern: Stämpfli & Cie., 1952. Pp. 95.

Hundert Jahre Schweizerisches Recht. Jubiläumsausgabe. Basel: Verlag Helbing & Lichtenhahn, 1952. Pp. 437.

KAUFMANN, M. *Patente, Muster, Modelle und Marken*. Kilchberg-Zch.: Dr. ing. M. Kaufmann. 1952. Pp. 34.

MAHSOUB, S. *La force obligatoire de la loi pénale pour le juge*. Lausanne: Rouge & Cie., 1952. Pp. 122.

PERRET, R. *La reconnaissance et l'exécution des jugements étrangers aux États-*

Unis. Lausanne: Imprimerie Centrale SA., 1951. Pp. 261.

SCHNITZER, A. F. *De la Diversité et de l'Unification du Droit*. Basel: Verlag für Recht und Gesellschaft AG., 1946. Pp. 111.

SCHNITZER, A. F. *Handbuch des Internationalen Privatrechts unter besonderer Berücksichtigung der Schweizerischen Gesetzgebung und Rechtsprechung*. Band I–II, 3rd ed. Basel: Verlag für Recht und Gesellschaft AG., 1950. Pp. 897.

SCHNITZER, A. F. *Vergleichende Rechtslehre*. Basel: Verlag für Recht und Gesellschaft, AG., 1945. Pp. 497.

SCHÖNENBERGER, W. *Schweizerisches Obligationenrecht*. Zürich: Schulthess & Co., 1952. Pp. xxxix, 727.

VOEGLI, H. R. *Die Lagerscheine, besonders ihre Verpfändung, im englischen und französischen Recht*. Bern: Verlag Stämpfli & Cie., 1952. Pp. 125.

U. S. A.

ALLEN, F. E. *The Treaty as an Instrument of Legislation*. New York: The Macmillan Company, 1952. Pp. xxi, 114.

ANDRUSS, H. A. *Burgess Business Law*. 4th ed. Chicago: Lyons & Carnahan, 1952. Pp. 623.

BAILEY, S. D. (ed.) *Political Parties and the Party System in Britain*. The Hansard Society Series in Parliamentary Government. Volume V. New York: Frederick A. Praeger, 1952. Pp. xii, 211.

BAILEY, S. K.—SAMUEL, H. D. *Congress at Work*. New York: Henry Holt & Co., 1952. Pp. x, 502.

BARTON, W. E.: *Renegotiation of Government Contracts*. Indianapolis: Bobbs-Merrill Company, Inc. 1952. Pp. xvi, 359.

BERGER, M. *Equality by Statute*. Foreword by Robert M. MacIver. New York: Columbia University Press. 1952. Pp. 238.

BLOUGH, R. *The Federal Taxing Process*. New York: Prentice-Hall, 1952. Pp. 503.

BOWLE, J. *Hobbes and His Critics*. A Study in Seventeenth Century Constitutionalism. New York: Oxford University Press, 1952. Pp. 215.

BREWER, J. M. *Wellsprings of Democracy*. New York: Philosophical Library, 1952. Pp. 232.

BROWN, E. C. *Effects of Taxation—Depreciation Adjustments for Price Changes*. Cambridge: Harvard University Press, 1952. Pp. 161.

CHEEVER, D. S.—Haviland, H. F. Jr. *American Foreign Policy and the Separation of Powers*. Cambridge: Harvard University Press, 1952. Pp. xii, 244.

CLAGETT, H. L. *Administration of Justice in Latin America*. New York: Oceana Publications, 1952. Pp. ix, 160.

CLEMENTS, A. V. *Comments, Cases and Text on Criminal Law and Procedure*. Buffalo: Dennis & Co., Inc., 1952. Pp. xix, 941.

Current Trends in State Legislation 1952. Studies of Recent State Legislation Prepared by the Legislative Research Center, University of Michigan Law School. Ann Arbor: University of Michigan Law School, 1952. Pp. xvii, 580.

DE LA GUARDIA, E. *A Statement of the Laws of Panama in Matters Affecting Business*. Washington: Pan American Union, 1951. Pp. 81.

EMERSON, T. I.—HABER, D. *Political and Civil Rights in the United States*. Buffalo: Dennis & Co., Inc., 1952. Pp. xx, 1209.

Foundations of World Organization: A Political and Cultural Appraisal. Ed. Bryson, L., Finkelstein, L., Lasswell, H. D., MacIver, R. M. New York: Harper & Bros., 1952. Pp. 498.

GELLHORN, W. (ed.). *The States and Subversion*. Ithaca: Cornell University Press, 1952. Pp. 454.

HARPER, F. V. *Problems of the Family*. Indianapolis: Bobbs Merrill Company, 1952. Pp. x, 806.

HUSBAND, W. H.-DOCKERAY, J. C. *Modern Corporation Finance*. 3rd ed. Chicago: Richard D. Irwin, Inc., 1952. Pp. xiv, 747.

KRUSE, F. V. *The Community of the Future*. New York: Philosophical Library, 1952. Pp. 828.

LASSWELL, H. D. *The World Revolution of our Time*. Stanford: Stanford University Press, 1951. Pp. vi, 65.

Lectures on Taxation of Business Enterprise. Summer Institute on International and Comparative Law, University of Michigan Law School. Ann Arbor: University of Michigan Law School, 1952. Pp. xxv, 532.

LEWIS, B. W. *British Planning and Nationalization.* New York: The Twentieth Century Fund, 1952. Pp. xi, 313.

LIEN-SHENG YANG. *Money and Credit in China.* A Short History. Cambridge: Harvard University Press, 1952. Pp. 143.

LORENZEN, E. G. *Cases and Materials on the Conflict of Laws.* St. Paul: West Publishing Co., 1951. 6th ed. by Lorenzen, E. G. and Stumberg, G. W. Pp. lii, 918.

MARSH, H., JR. *Marital Property in Conflict of Laws.* Seattle: University of Washington Press, 1952. Pp. xi, 263.

Martindale-Hubbell Court Calendars. Reprinted from Martindale-Hubbell Law Directory. For use in connection with *Modern Procedure and Judicial Administration* by Arthur T. Vanderbilt. 1952. Pp. 94.

MILLAR, R. W. *Civil Procedure of the Trial Court in Historical Perspective.* Judicial Administration Series. Newark: National Conference of Judicial Councils, 1952. Pp. 534.

PERKINS, R. M. *Cases and Materials on Criminal Law and Procedure.* Brooklyn: The Foundation Press, Inc., 1952. Pp. xxxv, 851.

RICHARDSON, W. C. *Tudor Chamber Administration 1485–1547.* Baton Rouge: Louisiana State University Press, 1952. Pp. xiii, 541.

ROBLES, J. G.: *A Statement of the Laws of Guatemala in Matters Affecting Business.* Washington: Pan American Union, 1951. P. 121.

ROSS, A. *Why Democracy?* Cambridge: Harvard University Press, 1952. Pp. 249.

SERENI, A. P. *Italian Law.* Reprint from *Italian Culture in the Twentieth Century.* 1952. Pp. 63–72.

SHEPHERD, H. *Contracts and Contract Remedies. Cases and Materials.* Brooklyn: Foundation Press, 1952. 3rd ed. Pp. xxiv, 1355.

SIBLEY, M. Q.—JACOB, P. E. *Conscription of Conscience. The American State and the Conscientious Objector 1940–1947.* Ithaca: Cornell University Press, 1952. Pp. 580.

SMITH, D. T. *Effects of Taxation. Corporate Financial Policy.* Cambridge: Harvard University Press, 1952. Pp. 301.

STONE, J. *The Province and Function of Law.* Cambridge: Harvard University Press, 1950. Pp. lxi, 918.

TRACY, J. E. *Handbook of the Law of Evidence.* New York: Prentice-Hall, 1952. Pp. 382.

VANDERBILT, A. T. *Cases and Materials on Modern Procedure and Judicial Administration.* New York: Washington Square Publishing Corp., 1952. Pp. xx, 1390.

WINTER, W. D. *Marine Insurance—Its Principles and Practice.* New York: McGraw-Hill Book Co., Inc., 1952. 3rd ed. Pp. 551.

UNITED NATIONS PUBLICATIONS

Thèses de Sciences Sociales. Catalogue analytique international de thèses inédites de doctorat, 1940–1950. Paris: UNESCO, 1952. Pp. 231.

Bulletin

Special Editor: KURT H. NADELMANN
American Foreign Law Association

REPORTS

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW—The annual meeting of the Bureau of the International Committee of Comparative Law was held on July 17th, 1952, at Cambridge, England. There were present Messrs. Farag Bey, De Sola Cañizares, Ussing, and Coudert, Members of the Bureau; Messrs. David and Hamson, Secretary General and Assistant Secretary General of the Committee; and certain other persons particularly interested in the work of the Committee. The other members of the Bureau, Messrs. de la Morandière, Gutteridge and Vallindas, were unable to attend.

Two new National Committees, representing Denmark and Lebanon, were admitted to membership, making a total of twenty countries represented in the Committee. Other National Committees are being organized and will in due course apply for membership.

Professor Niboyet's general report on the study of legal education in eight major countries, not quite completed at the time of his death, was discussed, and Professors Hazard and Eisenmann were designated to prepare a final report for submission to UNESCO.

The meeting was advised that a draft Catalogue of Sources and Documentation covering most countries of the world had been submitted to UNESCO in June and that all National Committees had been requested to submit suggestions for further work to be undertaken by the Committee in the field of documentation.

The Bureau decided that it would be desirable to publish a series of legal bibliographies similar to that recently completed by Professor David. This work, which will be published in English by the French Embassy in the United States, includes an extensive introduction commenting upon the important textbooks and current publications in all branches of French law. It is believed that bibliographies covering ten other countries can be published by 1954 if the necessary funds are made available. The Bureau decided also to take all possible steps to encourage the translation of important legal works, such as Professor Gutteridge's Comparative Law, a French translation of which will soon appear as a publication of the Committee.

The outline submitted by Professor Ussing for a basic introduction to the laws of Denmark, Norway, and Iceland was approved, and the Bureau agreed to sponsor the introduction to the law of the United States now in course of preparation by Professor and Mrs. André Tunc. The Secretary General reported that he and Professor de Vries of Columbia University were collaborating in the preparation of an introduction to French law to be completed before the end of 1954.

The next meeting of the Bureau will take place in Copenhagen in May, 1953.

ALEXIS COUDERT

THE SIENA CONFERENCE OF THE INSTITUTE OF INTERNATIONAL LAW—The 1952 session of the *Institut de Droit International* held at Siena, Italy, April 17-26, was attended by 64 members and associates, the largest attendance in a quarter of a century. Unfortunately, the controversial subject of the International Effects of Nationalizations absorbed nearly three full days of debate, so that the consideration given to other subjects of international law and the conflict of laws was sharply abridged. The subject of nationalizations proved to be not yet ripe for agreement, and the discussion

was officially pronounced to be only an exchange of views.

The committee of which Mr. Yanguas Messia (Spain) was *rapporteur* presented a report on the influence upon conflicts rules resulting from demographic conditions, such as immigration, changes in populations, and the like. It is a new subject having sociopolitical rather than purely juridical implications. The Institute adopted two resolutions on the subject, as follows:

1. The rules of private international law should not, for demographic reasons, make use of connecting factors (*points de rattachement*) which give rise to a difference between the spheres of application of national and foreign legislation.

2. The rules of private international law should, generally speaking, use criteria which are capable of internationalization, i.e., which lend themselves, in particular, to adoption in international conventions, thus avoiding the danger of conflicting solutions of a given case in different countries.

The committee of which M. Lémonon (France) is *rapporteur* presented a report on The Immunities of Foreign States and Governments with reference to Jurisdiction and Execution. Although ordinarily conceived of as primarily affecting states or governments, the discussion revealed that the subject involved a very large influence upon private rights as well. Accordingly, it was referred to the section dealing with conflicts of law and will be brought up at the next conference of the Institute for final action.

A new committee was created with Professors Meijers (Netherlands) and Lewald (Switzerland) as *rapporteurs* to prepare a comprehensive report on the increasingly important and complex problems of Renvoi in the Conflict of Laws.

The next conference of the Institute will be held in France at a place yet to be selected, either during the autumn of 1953, or the spring of 1954. Professor A. de La Pradelle of Paris was elected President, and Professor A. von Verdross of Vienna, First Vice-President. Dr. Hans Wehberg of Geneva continues as Secretary-General.

ARTHUR K. KUHN

BRUSSELS CONFERENCE ON MARITIME LAW—The Ninth Conference in the series of international conferences on maritime law, begun in 1905 and interrupted since 1926, was held in Brussels in May, 1952. The governments of twenty-six nations were represented. The United States was one of the nations represented by observers. Three new international conventions were signed: the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation; the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision; the International Convention relating to the Arrest of Sea-Going Ships.

INTERNATIONAL INSTITUTE OF PUBLIC LAW—The annual meeting of the International Institute of Public Law, held in Paris, May 27 and 28, 1952, had "Human Rights in International Society" on its agenda. Reports were presented by Professors Georges Scelle and B. Mirkine-Guetzévitch.

SPANISH-PORTUGUESE-AMERICAN PENAL AND PENITENTIARY CONGRESS—The First Spanish - Portuguese - American Penal and Penitentiary Congress, which was held in Madrid and Salamanca from July 5 to 12, 1952, was attended by 118 lawyers from Spain and 83 foreign lawyers. More than one hundred papers had been prepared for the five topics included in the agenda (this Journal, vol. I, p. 195). The "Actas and Memorias" of the Congress will be published by the Instituto de Cultura Hispanica (Avenida de los Reyes Católicos, Ciudad Universitaria, Madrid), and the Anuario de derecho penal y ciencias penales, published by the Instituto de Estudios Jurídicos (calle Medinaceli 2, Madrid), will publish a "Crónica del Congreso" in a special issue.

FOURTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION—The Fourth International Conference of the Legal Profession under the auspices of the International Bar Association was held in Madrid, Spain, from July 16 to 23, 1952. Thirty-six countries were represented. A number of national bar associations which recently joined the Association sent delegates for the first time—including those of Switzerland, Japan, and Portugal. There were 35 representatives from the Moslem countries, and a strong delegation from the Philippines. South America was also well-represented.

The topic "International Judicial Cooperation," upon which 24 papers were filed, was well prepared, Mr. Harry LeRoy Jones, of Washington, D.C., being chairman of the committee. The Hon. Irving R. Kaufmann and Otto C. Sommerich, both of New York, presided over the two sessions in which the topic was discussed. The International Bar Association expressed itself in favor of the negotiation of treaties to improve the procedure for taking of evidence and the service of documents.

Great interest was also shown in the topic, "The Relationship between the Executive and Judicial Powers." It became clear that all over the world there is a trend to increase the power of the administration and to limit the powers of the courts of justice. The International Bar Association declared that the executive power should remain subject to the rule of law and that the legality of its acts should remain subject to examination by independent judicial bodies.

Lively discussions took place in connection with the Code of Ethics for Lawyers under the leadership of Mr. William Roy Vallance, of Washington, D. C.

On the topic "Rights of Riparian States in connection with the Exploitation of the Subsoil of the Continental Shelf," the International Bar Association expressed itself in agreement with the fundamental principles laid down by the International Law Commission in its draft of 1951. There was a difference of opinion as to the definition of the continental shelf. Mr. Saher, of New York, suggested accepting the definition of the Committee, which is in conformity with the proclamation of the President of the United States. Continental European lawyers were more in favor of a specific determination of the continental shelf.

Dr. Ivan S. Kerno, Assistant Secretary General of the United Nations, and Professor Max Sorensen, of Denmark, gave a survey of the Draft Code of Offenses against the Peace and Security of Mankind and of the Draft Statute of an International Criminal Code. The late Professor Vespasian V. Pella presented a report on this topic. He was always a pioneer in this field and the report he had prepared for the Third Conference was circulated by the Secretariat of the United Nations.

Mr. W. H. Reeves, of New York, presented a paper on "National Monetary Controls Affecting International Trade". Mr. Ethan D. Alyea, of New York, presented a report "Subsidiary Corporations under the Civil and Common Law". Mr. Pierre A. Frye, of New York, filed a report on Fiscal Law and, together with Mr. Arnold A. Frye, another on International Economic Cooperation. The "Release of Funds by the United States Wartime Foreign Funds Control" was also discussed. A list of papers filed by American authors is attached[1].

EDWARD V. SAHER

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[1] Papers presented by American authors:

EDWARD W. ALLEN: On the Rights of Fisheries.

ETHAN D. ALYEA: Subsidiary Corporations under the Civil and Common Law.

ROSALIND G. BATES: Conciliation in Domestic Relations.

JOHN S. BRADWAY: A Problem in the Field of International Legal Aid.

NICHOLAS R. DOMAN: A Resumé of the Schuman Treaty.

MARTIN DOMKE: Arbitration in Inter-Governmental Economic Relations.

ALBERT A. EHRENZWEIG: The Recognition of Foreign Custody Decrees in the U. S.

UNESCO COLLOQUIUM ON LEGAL EDUCATION—A colloquium on legal education was held July 18–19, 1952, under the auspices of the International Committee for Comparative Law and the sponsorship of UNESCO. The occasion occurred immediately following the meeting of the Executive Bureau of the International Committee, held at the University of Cambridge. René David, secretary general of the International Committee and professor of comparative law at the University of Paris, was in the chair. Participants were K. Wolff (Austria), J. Blondeel (Belgium), H. Ussing (Denmark), W. Farag (Egypt), M. Ancel, H. Batiffol, A. Bertrand, C. Eisenmann, H. Leaute, M. Motulsky, A. Tunc, R. Vouin (France), P. J. Zepos (Greece), Mlle Ruprecht (Germany), P. de Sola Cañizares (Spain), L. C. B. Gower, R. H. Graveson, C. J. Hamson, O. Kahn-Freund, E. Lewis, K. Lipstein, J. L. Montrose, E. C. S. Wade (United Kingdom), M. Lassen (Sweden), and A. C. Coudert, A. Ehrenzweig, J. N. Hazard, M. S. McDougal, S. E. Thorne (United States). Dr. Szczerba-Likiernik attended for the Department of Social Sciences of UNESCO.

For a year the International Committee has been preparing a report for UNESCO on the teaching of law in eight representative countries. The colloquium was called to discuss the draft, prepared by Professor Niboyet, of Paris, just prior to his death. In consequence, the group had before it a rather extensive study incorporating the facts submitted by national reporters from eight countries. On the basis of the discussions a redraft will be prepared and submitted to UNESCO to be incorporated in its extensive study of the teaching of the social sciences.

J. N. H.

UNIVERSITY OF CAMBRIDGE CONFERENCE OF TEACHERS OF LAW—Intensive analysis of five subjects of basic current importance to the legal profession was the business of a conference of teachers

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ARNOLD FRYE and PIERRE A. FRYE: International Economic Cooperation.

PIERRE A. FRYE: International Fiscal Law.

ANDREW FRIEDMANN: Economic Warfare in the Law of the United States.

JUDGE LOUIS GOLDSTEIN: Modern Trends in the Administration of Criminal Justice in America.

J. A. C. GRANT: Methods of Unifying the Law.

WILLIAM A. HYMAN: Inadequacy of Liability Limits under the Warsaw Convention.

EMILIO VON HOFMANNSTHAL and RUDOLPH C. NEURENDORFFER: Legal Basis for International Economic Co-operation.

HARRY LEROY JONES: American Proposals for Reform of International Judicial Procedure—a Preliminary Program of Reciprocal Information.

FRANZ MARTIN JOSEPH: Organizing International Businesses; and Atlantic Union: Nato's Next Step?

NORMAN M. LITTELL: Improvements in Legal Climate for Investments Abroad.

BRUNSON MACCHESNEY: The Experience of the U. S. with the Enforcement of State Judgments and Laws and Foreign Judgments.

GEORGE H. OWEN: International Judicial Cooperation.

AMOS J. PEASLEE: Report of the Committee on Constitutional Structure of the United Nations.

W. H. REEVES: National Monetary Controls Affecting International Trade.

EDWARD VON SAHER: Uniform Legislation in the Benelux Countries on International Conflicts of Law; and The Release of Funds which, during the War, were Subject to Foreign Funds Control.

CAROLINE K. SIMON: Human Rights.

OTTO C. SOMMERICH: Governments as Defendants.

WILLIAM ROY VALLANCE: Report of the Committee on a Code of Ethics.

CHARLES WOLFSON: International Judicial Co-operation.

WALTER H. ZEYDEL: Selected Readings on the Law of Fisheries; and Selective Supplemental Bibliography on Territorial Waters and the Continental Shelf with Added Material on Fisheries.

of law called by the University of Cambridge for the ten day period, July 21–31, 1952. The subjects selected by an international preparatory committee, chaired by C. J. Hamson, Reader in Comparative Law at the University of Cambridge and Chairman of the Conference, all related in some measure not only to the technical problems of the law but to the role which law and lawyers are coming to play in developing social relationships throughout the world. The panel subjects were the following: (a) the protection of the accused, (b) civil liability without fault, (c) the relative merits of the various methods of handling case law in different systems, (d) the law of succession, and (e) labor law.

Delegations were invited from France, Germany, the United Kingdom, and the United States, and individuals were brought from Australia, Belgium, Canada, Denmark, Greece, New Zealand, South Africa, and Spain. Those attending from the United States were George C. Dession (Yale), Albert A. Ehrenzweig (California), John N. Hazard (Columbia), Myres S. McDougal (Yale), Max Rheinstein (Chicago), Stefan A. Riesenfeld (Minnesota), and Arthur von Mehren (Harvard). Participants had been assigned to one of the five panels in advance and had prepared material for discussion.

After words of greeting from Lord Tedder, Chancellor of the University, Professor H. C. Gutteridge, the world dean of comparative lawyers, spoke on the achievements of the discipline and what was currently possible of accomplishment. All panels made two reports to a plenary meeting of the conference, one report at the outset being on what the panel believed to be the major problems of its field at the present time, and the other being on what it believed to be the trend of law as brought out in its deliberations. A final summing up was provided by Max Rheinstein in which the work of the conference was assessed. The principal papers and a résumé of the discussion will be edited by C. J. Hamson and published by the Cambridge University Press.

No account of the conference could close without recognition of the generosity of those who made it possible. The Carnegie Corporation of New York provided travel funds for the American group. The French Government met the expenses of the Frenchmen present. The Master and Fellows of Trinity College provided rooms in the college and meals in the great hall to the participants. The structure and arrangements for the conference merit praise. The scheme of intensive panel discussions attended only by experts coupled with two plenary sessions to which each panel reported and following which extensive discussion from the floor was possible provided a *modus operandi* unsurpassed by any previous comparative law conferences. The allocation of ten days to such study, unencumbered with other activities and with all participants living and working in one place removed from the distractions of a great city was felt to be a primary cause for the success of the conference.

J. N. H.

GENEVA COMMITTEE ON ENFORCEMENT OF FOREIGN CLAIMS FOR SUPPORT—A committee of experts, appointed by the Secretary-General of the United Nations, met in the Palais des Nations at Geneva, Switzerland, from August 18 to 28, 1952, to formulate, on the basis of working drafts prepared by the United Nations Secretariat, a model convention or model reciprocal law for the recognition and enforcement abroad of maintenance obligations. As the result of ten days' intensive labors, the committee unanimously approved the drafts (in English and French) of two proposals: (1) a draft *multilateral* convention on the enforcement of maintenance *claims* abroad, to provide facilities for the preparation of such claims in the state of the dependent and for their prosecution in the state of the obligor; and (2) a draft *bilateral* convention or model law for the recognition and enforcement of foreign maintenance *decrees*.

The first of these proposals is a new development to deal with an increasingly

acute problem which has been studied at the international level since the Twenties; it offers a solution that, it is hoped, may be acceptable for both common law and civil law jurisdictions, unitary or federal. The second is a revision of the project prepared by committees of the International Institute of the Unification of Private Law in 1937–8 and 1949, excluding the notion that mere residence of the petitioner is a sufficient ground of jurisdiction to render a maintenance decree.

The members of the committee, representing both civil law and common law countries, were Mme M. Kraemer-Bach, Professors K. Lipstein, E. M. Meijers (president), F. C. de San Tiago Dantas, and H. E. Yntema (vice-president), and Messrs. M. Matteucci, Secretary-General of the Rome Institute (reporter), and A. Saleh.

H. E. Y.

GENEVA CONFERENCE ON UNIVERSAL COPYRIGHT—After five years of preparatory work under UNESCO auspices, a Universal Copyright Convention was signed in Geneva on September 6, 1952, at the conclusion of a three-weeks conference participated in by 46 countries.

The development of the Convention has extended over several years. Preliminary meetings and discussions between copyright experts of various countries were held in Paris in 1947 and 1949. Governments were then requested to submit their views on a number of crucial points, and an important meeting was held in Washington in 1950, at which agreement was reached on certain basic principles. The Governments were then requested to comment on the work of the experts at the Washington meeting. In Paris in 1951, another meeting was held, and this time the experts attended in the dual capacity of experts and representatives of their governments. The result of the 1951 meeting was a draft of a convention which was promptly circulated to all governments. Finally, an Intergovernmental Conference was held in Geneva from August 18, 1952 to September 6, 1952. Some 60 countries had participated in attending some or all of the conferences, in answering the governmental inquiries, etc., 46 attended the Geneva Conference, and 36, including the United States, signed the treaty.

The governing principle of the treaty is the concept of "national treatment," namely, each country agrees to give nationals of other countries at least as effective copyright protection as it gives its own citizens. National treatment will be given not only to works of nationals of all contracting countries, but also to all works first published in those contracting countries.

The Convention will not go into effect until 12 countries, at least 4 of them not members of the Berne Union, ratify. The United States will not be in a position to ratify the treaty until it amends its domestic law to bring it into line with the treaty.

Some of the required changes in the U. S. law are: modification of our manufacturing requirements with respect to printed works, other than those of U. S. citizens, first published abroad in the English language; changes in requirements as to form and location of the copyright notice on foreign works, including the power to demand deposit of such foreign works for the Library of Congress; and the reciprocal provision as to protection of musical recordings.

ABRAHAM L. KAMINSTEIN

LUCERNE CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION—The forty-fifth Conference of the International Law Association met at Lucerne August 31 to September 6, 1952. It was opened by President N. V. Boeg (Denmark), and Professor Max Gutzwiller (Switzerland) was chosen as the new President. Resolutions were adopted on several subjects. The Committee on International Company Law was asked to continue its work, and to include the "determination of the personal law of companies and of the matters governed by the personal law," and "the law applicable to corporate liability whether in contract or in tort." Professor John C. Cooper made an excellent report on the Legal Status

of Aircraft, and was requested to put it into the form of an annotated draft convention for consideration at the next Conference; the draft when approved by the Air Law Committee, is to be forwarded to ICAO for its consideration. The Conference approved also a report on Hospital Aircraft in Time of War submitted by Professor Paul de la Pradelle. The subject of Rights to Sea Bed and its Subsoil was again taken up, on the basis of a report by Professor J. P. A. François, and referred to a new committee for study and report. Professor Derenburg presented a thorough report for the Committee on Trademarks, but unfortunately the printed copies did not arrive in time for study. The Conference agreed that it was not feasible to call for an international agreement providing for textual incorporation into national laws of a Model Law on Trademarks, but asked the Committee to elaborate a draft Model Law. A Swiss resolution regarding Jurisdiction of International Private Law in Trade Mark matters is to be studied. The Committee on State Immunities (Professor Carabiber, Chairman and *Rapporteur*) resolved, as to substantive law, "that foreign States should not be immune from suit in relation to their acts when engaged in private enterprise." It recommended, as to methods, that special international tribunals be set up as between Governments and foreign individuals, that States should regulate by treaties the immunities which each State may claim in the courts of the other State, and that arbitration clauses be put into contracts between Governments and individuals. The Committee on International Monetary Law is to continue its study, keeping in close touch with authorities and with the local branches of the Association. Finally, the Family Relations Committee (William Latey, Chairman) is to continue work on mutual recognition of judgments in divorce and nullity, and on mutual recognition and enforcement of maintenance for wives and children. The reports which were prepared by the American Branch are included in the pamphlet "Proceedings and Committee Reports of the American Branch of the International Law Association" (New York, 1952).

CLYDE EAGLETON

SIXTH INTERNATIONAL CONGRESS OF FISCAL LAW—Important national and international tax questions were the subject of discussions and resolutions at the Sixth International Congress of Fiscal Law, held at Brussels, September 8 to 11, 1952. The Luxembourg-Belgian Section of the International Fiscal Association, which Section is also known as the Study Center of Fiscal Law, provided an excellent seat for the Congress in the hall of the Provincial Council of Brabant.

The first subject that had been prepared for the Congress by national reporters and had been summarized by the general reporter, Mr. Joseph Kaufmann, Luxembourg, was a comparison of the tax provisions concerning depreciation allowances and reserves. A resolution was adopted which may be briefly summarized as follows: Whereas to meet the need of obviating the hardships which result from a strict application of the principle of imposing the income tax on an annual basis, which may be harmful to urgent economic needs, the Congress recommends: (1) the application in a more flexible manner of the principle of the annual imposition of the tax in relation to the necessities of the enterprise; (2) an exemption of reserves intended to cover the probable expenses and losses existing (*en germe*) on the date of the closing of the balance sheet; (3) the recognition, with regard to depreciation, that (a) the entire amount allowed as depreciation corresponds to the actual amounts deducted from the income of the enterprise, either through a deduction from income realized in profitable years of depreciation allowances applicable to years in which a deficit is realized, or at least through the allowance of a deduction over a sufficiently long period for the losses of the enterprise; (b) from the moment when the national money is no longer in the position to carry out correctly its role as a measure of value, appropriate measures

should be taken to enlarge the basis of depreciation, such as by the adaption of that basis to the economic evolution, or by the admission of completely or partially exempted reserves.

The resolution adds that achievement of a satisfactory solution of the problem internationally would be greatly facilitated by the preparation of a dictionary of terms used in the different languages with their respective definitions. It, therefore, invites the International Bureau of Documentation, Amsterdam, to prepare the dictionary of terms.

Another subject discussed was the relative burden of taxes and of social security charges which are termed "*parafiscales*", on the cost of production. The study of this subject has not yet been concluded.

A further resolution concerns the development of international transport by sea and by air and was prompted by the difficulties resulting from the attempts of certain countries to subject to tax the part of the profits of a foreign shipping or air transport enterprise that is properly attributable to sources within the taxing country. When several countries endeavor to do this, the same income may be taxed two or three times. In order to avoid this duplication of levies, the Congress noted that it is practically impossible to isolate the part of the income of a foreign enterprise that is properly attributable to a given country and, therefore, expressed the view that the taxation of the net income derived by enterprises engaged internationally in transportation by sea or by air, must be reserved exclusively to the real seat of the enterprise without any other State being able to impose that kind of tax.

MITCHELL B. CARROLL

SAN FRANCISCO CONFERENCE OF THE AMERICAN BAR ASSOCIATION—The Comparative Law Division of the Section of International and Comparative Law again attracted favorable attention for excellence of program at its annual breakfast at the American Bar Association meeting in San Francisco in September, 1952. Under the Chairmanship of Edward W. Allen of Seattle, and with Edward S. Feldman of Los Angeles as moderator, there was a forum discussion of "Negligence without Fault," based on a provocative address by Professor Albert Ehrenzweig of the University of California. Jacob Chaitkin of the Los Angeles Bar led the discussion of "Taking by Aliens under Wills where Reciprocity is Required under State Law" and Professor Edward D. Re of St. John's University discussed the *De Los Angeles Melon v. Entidad Provincia Religiosa* case.

The Comparative Law Division includes ten Committees, the reports of which are published annually in the Proceedings of the Section. The Proceedings for 1951, printed in 1952, included reports of seven of these ten Committees, and the Proceedings for 1952, which will be available shortly, will include about the same number of Comparative Law Division reports. The Proceedings are each year indexed in the Index to Legal Periodicals and are available at most law school libraries. Nonmembers of the Section may obtain copies by purchase for a nominal sum from the American Bar Association.

In the forthcoming Proceedings for 1952, particular attention is called to the reports of the Committee on Comparative Civil Procedure and Practice, primarily concerned with the problem of proving foreign documents in federal courts, and the report of the Committee on Latin-American Law summarizing legal trends in Latin America for the last year.

The Committee on Far Eastern Law is continuing its efforts to bring about the establishment of a Far Eastern Law Center in the Law Library of the Library of Congress, similar to the Latin-American Law Center which has been begun largely due to the efforts of the Committee on Latin-American Law.

LYMAN M. TONDEL, JR.

QUEBEC CONFERENCE OF THE ASSOCIATION HENRI CAPITANT POUR LA CULTURE JURIDIQUE FRANÇAISE—In connection with the Centenary of the Law School of

Laval University, Quebec, an international congress took place in September, 1952, in Quebec and Montreal under the auspices of the Canadian Group of the *Association Henri Capitant pour la Culture Juridique Française*. This was the second meeting of the Canadian Group which held its first congress in August, 1939.

For the recent congress, invitations were extended not only to the regional groups of the Association in the various parts of the world but also to institutions and individuals in the United States. A "comparative law day" was added to the program for the particular benefit of lawyers from common law countries. The topics on the regular program were: the status of the wife in modern marriage law; contracts for the benefit of third parties; natural obligations; public policy; modern developments in the law of evidence. Reports were submitted by delegates from Quebec, France, Belgium, Switzerland, Italy, Cuba, and Uruguay. Delegates from the United States, including professors George W. Stumberg, of the University of Texas, James Oliver Murdock, of George Washington University, and Arthur T. von Mehren, of the Harvard Law School, took part in the discussions.

The topics discussed on the "comparative law day" were "Evidence in the Province of Quebec," with Walter S. Johnson, Q.C., of the Montreal Bar, as reporter, and "Public Policy and Good Morals in Quebec Law," with Louis Baudoin, professor of law at McGill University, as reporter. A Round Table discussion took place on "The Place of French Law in Teaching Comparative Law in the United States and other Common Law Jurisdictions." Professor James Oliver Murdock opened the discussion. Other participants were Professors Arthur von Mehren, F. C. Auld, of the University of Toronto School of Law, R. W. Parsons, of the University of Western Australia Law School, and Judge Marc Ancel, of the Paris Court of Appeals, secretary general of the Paris Institute of Comparative Law. Dr. Kurt H. Nadelmann, representing the American Foreign Law Association, who was in the chair, contributed a sketch of Peter S. Duponceau, eminent French-born Philadelphia lawyer, a contemporary of Kent and Story.

Upon the occasion of the congress, the Louisiana Law Institute presented sets of its publications to the principal law libraries of the Province of Quebec. The delegates were received by the Provincial Government, the Bar of the Province, the Junior Bar, and the Law Faculty of Laval University. Marie-Louis Beaulieu, Q.C., professor at Laval University, was in charge of the skillfully prepared Quebec meeting. The proceedings of the congress will be published.

K. H. N.

CONFERENCE ON PROPOSED ISRAELI SUCCESSION BILL—A Conference on selected problems arising under a proposed Succession Law for Israel was held on October 25, 1952, at the Israeli Consulate General in New York. This was the first conference called by the Harvard Law School in connection with the Israel Co-operative Research for Israel's Legal Development.

The Co-operative Research was established early in 1952 to render legislative assistance to the Israeli Ministry of Justice as it faces the difficult task of replacing by new and progressive legislation the patchwork of Moslem, Ottoman, English, and religious laws now in force in Israel. The Co-operative Research is furnishing this assistance in the form of analysis and critique in the light of comparative law. Experts from the Harvard Law School and other universities and Israeli graduate students sent for that purpose to Harvard Law School by their government, participate in this work.

At the present time, the Research is concerned with the provisions of a Succession Bill that was recently published by the Israeli Ministry of Justice, and it was on this subject that a conference was held in New York. Among those present were Dr. Haim Cohen, Minister of Justice, and Dr. Uri Yadin, Deputy Attorney General of Israel (the latter having drafted the Succession Bill),

Surrogates George Frankenthaler and Ivan Rubenstein, Professors Thomas Atkinson, Elias Clark, Arthur Nussbaum, Max Rheinstein, Messrs. Maurice Boukstein, Joseph A. Cox, and Phanor Eder, of the New York bar, and Mr. Joseph Laufer, the Director of the Co-operative Research. Principal topics discussed were the provisions of the bill concerning a spouse's rights upon intestate succession and family maintenance (which go considerably further than the British Act of 1938 and its predecessors in New Zealand, Australia, and elsewhere), the conflicts rules applicable to decedents' estates, and the problem of estate administration.

It is hoped that through suitable publications the results of the Co-operative Research which are of wider interest from the point of view of comparative law will soon become generally available.

JOSEPH LAUFER

ANNOUNCEMENTS

FOURTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW—A preliminary meeting of experts, attended by sixty-seven representatives from twenty-two countries, was held at Paris, August 1 and 2, 1952, under the auspices of the International Academy of Comparative Law. At this meeting, the program of the Fourth International Congress of Comparative Law to be held at Paris, August 1–7, 1954, was adopted.

Scholars in the United States are invited to participate in the preparation of papers for the Congress to be held in 1954. The national committee for the United States is at present being organized by Professor Roscoe Pound. Correspondence should be addressed to the Secretary, Professor John N. Hazard, at 20 E. 94th Street, New York 28, New York.

Under the rules of the Congress, the national committee decides the questions on which national reports are to be prepared and designates the reporters. Such reports, which should not exceed 5000 words, should be sent to Professor Hazard by June, 1953. The program of the Congress appears below.[1]

[1] PROGRAM OF THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW, PARIS, AUGUST 1–7, 1954.

SECTION I (GENERAL)

A. The Law of Antiquity
   1. International treaties in Antiquity.
   2. The development of the Roman law of contracts.
   3. Contacts and conflicts between legal systems of Antiquity.
   4. Rural law in the Late Roman and in the Eastern Empire.
   5. The penetration of the law of the High Middle Ages by Roman Law.
   6. The evolution of the law during the 16th, 17th, and 18th centuries as a result of the utilisation of the Roman and regional law.

B. Legal History
   1. The contributions made by writers and practitioners of the law of the *coutumes* to the development of private international law in the Middle Ages.
   2. The protection of persons with legal disabilities in the Middle Ages (excluding married women).
   3. Nature and applications of *Hommage.*

C. Canon Law
   1. The canon law and the state.
   2. The contributions of the canonists to the oldest doctrines of conflict of laws.
   3. The indissolubility of marriage in the law of the Roman, Anglican, Lutheran, Calvinist, Greek Orthodox, and other Christian churches since 1914.
   4. Power and jurisdiction of the Synods, Patriarchates, and the autocephalous churches of the Greek Orthodox Church.
   5. The legal relations of the spouses, marital and parental, in canon and civil law (subordination—legal equality).

D. Legal Ethnology
   1. The definition of the subject, its his-

tory and methodology, its relations with law, sociology, and the other branches of ethnology.
2. Law, religion, and morals. The criterion for distinguishing between legal and religious commands.
The magic and religious element in ancient codes and customs.
3. The legal maxims as forms of expression of law.

E. Oriental Law
1. The influence of "common law" and "equity" on Hindu law during the last 150 years.
2. Relationship between the laws of Hammurabi and Mosaic law.
3. The judicial system and the jurisdiction of the judge in Moslem law.
Agency in legal transactions under Moslem law.
The *théorie des risques* in the different schools of Moslem law.

F. Legal Philosophy
1. The impact of the concept of social security on every part of the law of today.
2. The relevance of will in the law.

G. The Study and Teaching of Law; Comparative Law and Unification
1. Current methods of teaching law.
2. The concept of a science of universal comparative law.
3. The means of making comparative law a fruitful element in legal education.
4. The unification of law; the current situation and the methods proposed to extend unification.
5. Foreign influences in the law of various countries.

SECTION II

A. Civil Law
1. Chattel mortgage without transfer of possession in modern legislation.
2. Currency and sliding scale clauses in contracts.
3. The proof of paternity and the progress of science: blood examination, etc. . . .
4. Liability to third parties for breach of contract.
5. Transfer of risk of property in the sale of fungibles.

B. Conflict of Laws
1. Unfair competition
2. The private law aspects of international industrial combinations (cartels, etc. . . .)
3. Recognition and enforcement of foreign decrees concerning the custody and support of children.
4. International conflicts principles and conflicts arising within political entities (e.g. Union Française, United Kingdom, United States. . . .)

C. Civil Procedure
1. The respective roles of judge and parties in fact finding and the importance of the *procès verbal* (recording of evidence).
2. Safeguards of judicial independence.
3. The scope of declaratory judgment suits.

D. Agricultural Law
1. Preservation of the agricultural enterprise as a legal entity (measures against division—autonomy).
2. The right of pre-emption.
3. Agricultural co-operatives.

SECTION III

A. Commercial Law
1. Civil liability of officers of corporate bodies (companies).
2. Amalgamation and subdivision of corporations.
3. The effect of currency control legislation on the validity and performance of commercial contracts.
4. Priorities in favor of the state and administrative agencies in the liquidation and rehabiltation of insolvent estates.
5. International cartels and national legislation.

B. Intellectual Property Rights
1. The title to copyright in moving pictures.
2. The tendencies to extend the rights of authors, *droits voisins* (rights of

performers and agencies of distribution).
3. The protection of new plant species.

C. Labor Law
1. Work councils and the protection of minorities.
2. The strike and the contract of employment.
3. Legal problems raised by collective bargaining agreements: their negotiation, enforcement, annulment, and extension.
4. Current trends in compensation for industrial accidents.

D. Air Law
1. The degree of the air-carrier's fault in its effects on such carrier's liability and in its relations to liability insurance in municipal and international law.

SECTION IV

A. Public Law
1. The role of constitutions in contemporary, political, and social life.
2. The separation of administrative and judicial tribunals.
3. The law of public services of an industrial and commercial character.
4. Federalism and decentralisation.
5. The problems raised by the civil service in the modern state.
6. Methods of nationalisation and methods of management of nationalised industries.
7. "Acts of State".
8. The judicial status of political parties.
9. The protection of the State against subversive activities.
10. Law making by professional associations.

B. Penal Law
1. Analogy in penal law.
2. Mistake of law.
3. Blood tests as a means of obtaining evidence in criminal proceedings.
4. Failure to give aid.
5. The extraterritorial effect of criminal judgments.
6. The effect of a criminal judgment on a civil action.
7. Crimes against the law of nations.
8. Illegal practice of medicine.

C. International Public Law
1. Limitations on national sovereignty with respect to immigration and naturalisation.
2. International protection of human rights before national tribunals.
3. Foreign economic interests before national jurisdictions.
4. Political systems and the international community.
5. The impact of agreements with respect to the organization of Europe on national constitutions, legislation, and administration.
6. International regulation of cartels and monopolies.

VARIA

ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO—The Argentine Section of the Société de Législation Comparée has been transformed into the "Asociación Argentina de Derecho Comparado". The seat of the Association is Montevideo 640, Buenos Aires. Dr. Sofanor Novillo Corvalan has been elected president and Dr. Ignacio Winizky secretary general. COMPARATIVE LAW RESEARCH ON RESTRICTIVE BUSINESS PRACTICES—The ad hoc Committee on Restrictive Business Practices set up by a Resolution of September 13, 1951, of the Economic and Social Council of the United Nations, has as one of its assignments the collection of information on restrictive business practices, whether based on cartel agreements or not, that affect international trade and international economic co-operation generally, and on legislation adopted and measures taken by individual member states in connection with such practices in order to restore free competition. The Committee which is composed of representatives of Belgium, Canada, France, India, Pakistan, Sweden, the United Kingdom, the United States, and Uruguay, with Ingvar Svennilson (Sweden) as chairman and

Sigmund Timberg (United States) as secretary, held its third session in Geneva in September, 1952, and is to submit its report to the Economic and Social Council of the United Nations not later than March, 1953.

HARVARD LAW SCHOOL—The Ford Foundation has recently made a grant to the Harvard Law School to finance the first years' operation of a research and training program in world tax laws, to be carried out in co-operation with the Fiscal Division of the United Nations. The program, directed by Professor Stanley S. Surrey, will emphasize problems of tax law and administration in under-developed nations, and problems of practical importance to the expansion of overseas trade and investment.

UNIVERSITY OF TORONTO—The Carnegie Corporation of New York has made a grant to aid in the establishment of a Comparative Law Center within the Faculty of Law of the University of Toronto. Among the objectives of the Center is publication of a series of comparative symposia on selected problems of comparative law. The editor of the series is Professor W. Friedmann.

CORNELL LAW SCHOOL—The James Foundation, New York, has made a grant to the Cornell Law School to enable it to expand its work in comparative law. The new program, under the direction of Professor Rudolf B. Schlesinger, is an extension of the "International Program" of the School, under which a course leading to an LL.B. degree "with Specialization in International Affairs" is offered to selected regular law students.

IN MEMORIAM

LORD MACMILLAN*—It is with regret that we have to report the death on September 5, 1952, at the age of 79, of an eminent comparative lawyer, The Rt. Hon. Lord Macmillan (Hugh Pattison Macmillan).

Macmillan studied at the University of Edinburgh and took his law degree at the University of Glasgow in 1896. The following year he entered active practice as an advocate, was eminently successful, and became King's Counsel in 1912. His busy life did not prevent him from scientific work in the law. He was editor of the Juridical Review, the leading law review of Scotland, from 1900 to 1907.

He was appointed Lord Advocate in 1924, and was sworn of the Privy Council and became an Honorary Bencher of the Inner Temple. In 1930, he became a Lord of Appeal in Ordinary, a life peerage being conferred upon him. His services as a judge, until his retirement in 1947, were notable. In the tradition of Lord Mansfield, he brought to his work that combination of knowledge of the Civil Law (as you all know, Scots law follows the Roman tradition) and of the Common Law which has so greatly enriched our jurisprudence.

This interest in comparative law was not confined to his judicial work. He was active in the Society of Comparative Legislation; he became chairman of the Executive Committee in 1933, and president in 1947. At the time of his death, he was an honorary vice-president of the International Law Association and was a frequent attendant at its meetings. He also took an active part at other international legal conferences. Those of us who attended the Second International Congress of Comparative Law at The Hague in 1937, still recall with deep emotion his address on Freedom of Thought, and his stirring tribute to the Netherlands as a land of toleration.

A collection of some of his many thoughtful contributions to the literature of the law was published in 1937 under the title "Law and Other Things". It contains one of the gems of comparative legal literature, "Two Ways of Thinking." This essay was also published in the same year in French under the title

* Read at the October 17, 1952, meeting of the American Foreign Law Association.

"Deux manières de penser" in *Recueil d'études en l'honneur d'Edouard Lambert*. Those of you who have not read it have a rich treat in store.

Among other contributions of special interest here were his presidency of the Stair Society and of the Ibero-American Institute of Great Britain, and finally his chairmanship of the Lord Chancellor's Committee on Advanced Legal Studies, which was instrumental in the foundation of the Institute of Advanced Legal Studies in London. He served as chairman or member of numerous other Royal Commissions and Public Committees and as Minister of Information at the beginning of World War II.

His public service was outstanding, but it was the simplicity of his character, unaffected by his rise to eminence, his unfailing courtesy and tact, his personal charm, that endeared him to those fortunate enough to know him.

PHANOR J. EDER